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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1945.

CERTIORARI GRANTED JANUARY 14, 1946.

8

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[fol. 1-13]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 21780-S

GILBERT E. THIEL, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant and Appellee

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL.—Filed September 2, 1943

In respect of the record on any appeal from the judgment entered herein on March 25, 1943, it is hereby stipulated by and between the parties hereto, through their respective counsel, as follows:

1. The above entitled action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, and was thereafter removed by defendant Southern Pacific Company into the United States District Court, for the Northern District of California, Southern Division. Thereafter, in said action, certain proceedings were had in said District Court with respect to said removal, motions to remand were made and denied, and said District Court duly made, entered and filed its decree restraining and enjoining any further steps or proceedings in said action in said State Court. An appeal was taken by plaintiff from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, said matter being entitled "Gilbert E. Thiel, Appellant, vs. Southern Pacific Company, a corporation, Appellee," and numbered on the records of said Circuit Court of Appeals No. 9012. A judgment of said Circuit Court of Appeals affirmed said [fol. 14] decree. Plaintiff made application to the Supreme Court of the United States for a writ of certiorari to review said judgment of affirmance and said application was denied. Thereafter the mandate of said Supreme Court of the United States showing denial of said petition for certiorari was issued and filed with the records of said Circuit

Court of Appeals in said proceeding No. 9912 and spread upon the minutes of said court. Thereafter the mandate of said Circuit Court of Appeals showing affirmance of said decree of the District Court and that the cause had been properly removed into said court was issued and filed with the records of the above entitled cause in the said and above entitled District Court and spread upon the minutes thereof. The record and proceedings with respect to said removal, motions to remand, decree granting injunction and appeal therefrom, and other matters above referred to, may be omitted from the transcript of record on this appeal, and any Court to which said appeal may go may look to its own record on said prior appeal (being matter No. 9912 in the said Circuit Court of Appeals), the same shall be deemed a part of this record without setting the same forth herein at length, and either party to this appeal and any Court to which this appeal may go may refer to said records and proceedings on file as part of the record herein as though [fol. 15] set forth at length in the transcript of record herein.

. . . . . .

[fols. 16-17] Dated: August 31, 1943.

Allen Spivock, Attorney for Plaintiff, Arthur B. Dunne, Dunne & Dunne, Attorneys for Defendants, Southern Pacific Company.

The foregoing stipulation is approved and it is ordered accordingly.

Sept. 2nd, 1943.

A. F. St. Sure, District Judge.

[File endorsement omitted.]

[fol. 18] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

GILBERT E. THIEL, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, First Doe, Second Doe and Third Doe, Defendants.

No. 299469

COMPLAINT FOR DAMAGES—Filed December 30, 1940

(Personal injuries)

Plaintiff complains of above defendants and alleges:

I

That plaintiff does not know the true names of defendants sued herein as "Does" and prays leave to insert same when ascertained.

II

That at all times mentioned herein said defendant Southern Pacific Company was and now is a corporation, duly organized under the laws of the State of Kentucky, having [fol. 19] a place of business and doing business in said City and County of San Francisco, and was operating a railroad which was engaged in the business of carrying passengers from Reno, Nevada to San Francisco, California, operating same as a public carrier.

III

That on or about February 25, 1940 and in said Reno, Nevada, plaintiff purchased a ticket from said defendant Company to take him by train to said San Francisco, California.

IV

That at said time and shortly thereafter, said defendant Company was informed thru one of its regularly uniformed special police officers and by other of its agents that plaintiff was not then in his normal mind by reason of excessive and continued drinking of alcoholic liquors and that plaintiff should not be taken as a passenger or else should be guarded on his said proposed trip to San

Francisco as plaintiff was in a highly depressed mental state over his marriage of a week before in said Reno and he might do something rash; that thereupon said special officer remained with plaintiff on the train for some time but then, acting in a careless and reckless manner, left him alone and unguarded before said train started for said San Francisco.

V

That on or about 8:30 P. M. of said date and while said train was in motion at or near the boundary line between [fol. 20] the State of Nevada and the State of California, plaintiff, while out of his normal mind and in said highly depressed mental state, suddenly opened the window of said train and leaping out, held on to said window sill with his hands for some time before falling to the ground; that one of defendant Company's regular conductors on said train saw plaintiff hanging from said window but negligently and carelessly failed to give the stop signal until after plaintiff had fallen to the ground.

VI

That said fall was caused by the careless and reckless conduct of said defendants who, with full knowledge of plaintiff's said condition, accepted him as a passenger and then carelessly and recklessly failed to take any reasonable precautions for his safety.

VII

That upon falling from said train, plaintiff's legs got under the wheels thereof and as a result of said fall plaintiff now has his right leg amputated above the knee, his left leg amputated below the knee and his left arm so badly mangled that he will never have the normal use of it; that plaintiff has been in several hospitals and has had about ten operations and is now in a cast from his neck to his waist and will so remain for at least several months; that plaintiff has suffered the greatest conceivable pain and agony since said accident and will continue to so suffer for the rest of his life.

[fol. 21]

VIII

That at the time of said accident, plaintiff was 28 years of age, in good health and without any physical defects

and was employed as a salesman and was earning about $200.00 per month; that plaintiff will not be able to do any work for some time to come, if ever; that plaintiff has incurred hospital, doctor, nursing, and such bills and is daily incurring more of same and hereby prays leave to insert the exact amounts later.

IX

That as a result of all of the above, plaintiff has been damaged in the total sum of $250,000.00, no part of which has been paid.

Wherefore, plaintiff prays judgment against said defendants in the sum of $250,000.00 with costs of suit and general and equitable relief.

Allen Spivock, Attorney for Plaintiff.

[fol. 22] *Duly sworn to by Allen Spivock. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, SOUTHERN PACIFIC COMPANY—Filed February 24, 1941

Comes now Southern Pacific Company, a corporation, defendant above named, and answering Plaintiff's Complaint, herein shows:

I

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of Paragraph III of said Complaint.

II

Denies each and every, all and singular, conjunctively, and disjunctively, the allegations of Paragraph IV of said Complaint, except defendant admits that one of its railroad policemen at Reno, Nevada, was informed on February 25, 1940, and prior to the departure from Reno, Nevada, of the train on which plaintiff rode, that plaintiff had been

drinking alcoholic beverage, and admits that it was a fact that he had been so drinking.

III

At or about 9:15 p.m. on February 25, 1940, plaintiff was on a train of defendant, which was running to Oakland, California, from Reno, Nevada. At or about said time, and at a point west of Verdi, Nevada and east of Truckee, California, and near the California-Nevada boundary line, plaintiff suddenly opened a window of said train and leaped [fol. 24] out said window of said train and fell to the ground below. Said train was moving at said time. By reason of said leap and fall, plaintiff was injured. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of said complaint, and each of them, as follows: as to plaintiff's sanity and psychological and mental state; that after leaping through the window of said train, plaintiff held on to the window sill with his hands for some time before falling to the ground. Avers that defendant's conductor on said train saw plaintiff when plaintiff was partially through said window. Denies each and every, all and singular, conjunctively and disjunctively the remaining allegations of Paragraph V of said complaint.

IV

Denies each and every, all and singular, conjunctively and disjunctively, the allegations of Paragraph VI of said complaint.

V

Defendant is informed and believes, and therefore avers that plaintiff was seriously injured as a result of said leap from said train, but is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of said complaint, as to the extent of and exact nature of the injuries sustained by plaintiff and as to the remaining allegations of Paragraph VII of said complaint.

[fol. 25]

VI

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, and each of them, of Paragraph VIII of said complaint.

VII

Denies each and every, all and singular, conjunctively and disjunctively, the allegations of Paragraph IX of said complaint.

As and For a Second, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company, shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. Prior to the time plaintiff boarded said train and at all of the time on February 25, 1940, while plaintiff was on said train, plaintiff so negligently, carelessly, recklessly, wilfully and wantonly conducted himself as to proximately cause and contribute to any and all of said injuries alleged to have been received by him and also while said train was in motion, and when said train was between Verdi, Nevada, and Truckee, California, plaintiff negligently leaped from said moving train, and thereby caused and contributed to any injury alleged to have been received by him.

[fol. 26] And As and For a Third, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. While said train was in motion, and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and thereby received any injury alleged to have been received by him.

II

Defendant is informed and believes, and therefore alleges that at said time and on said occasion plaintiff was in an abnormal psychological and mental state; that plaintiff so negligently, carelessly, recklessly, wilfully and wantonly conducted himself on said date of February 25, 1940, and

during a period of approximately one week prior thereto as to cause said mental condition and as to proximately cause and contribute to any and all of the injuries alleged to have been received by him.

And As and For a Fourth, Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company shows:

I

On or about February 25, 1940, plaintiff was on one [fol. 27] of defendant's trains. Said train was being operated at said time from Reno, Nevada to Oakland, California. While said train was in motion, and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and was thereby injured.

II

Any and all of said injuries were proximately caused by plaintiff's own independent, voluntary and wilful act in so leaping from said moving train.

And As and For a Fifth Separate and Distinct Defense to Plaintiff's Complaint Herein, Defendant Southern Pacific Company, shows as follows:

I

On or about February 25, 1940, plaintiff was on one of defendant's trains. Said train was being operated at said time from Reno, Nevada, to Oakland, California. While said train was in motion and when said train was at a point between Verdi, Nevada, and Truckee, California, plaintiff leaped from said moving train and was thereby injured.

II

At all times on February 25, 1940, plaintiff was in the company of his wife, Billie Brown Thiel, and/or one J. A. Morris. At all of said times plaintiff had submitted himself into the care and custody of his said wife and said Morris. At all of said times plaintiff's said wife and said Morris so [fol. 28] negligently, carelessly, recklessly, wilfully and wantonly conducted themselves as to proximately cause and contribute to any and all of the injuries alleged to have been received by plaintiff.

Wherefore, defendant Southern Pacific Company prays that plaintiff take nothing by reason of his complaint herein; that said defendant Southern Pacific Company have judgment for its costs herein, and that plaintiff be sent hence without day, and for such other different and further relief as, the premises considered, shall be fitting and proper.

A. B. Dunne, Dunne & Dunne, Attorneys for Defendant Southern Pacific Company.

Admission of Service.

[File endorsement omitted.]

[fols. 29-57] In United States District Court

Demand for Jury Trial—Filed March 5, 1941

Plaintiff, Gilbert. E. Thiel, hereby demands a trial by jury in the above action.

(Without waiver of right to move for remand to state court.)

Dated: March 4, 1941.

Allen Spivock, Attorney for Plaintiff.

(Receipt of Service.)

[File endorsement omitted.]

[fol. 58] In United States District Court

Notice of Motion to Strike Out Entire Jury Panel, etc.—Filed November 5, 1942

To the Above Defendant and to Mr. A. B. Dunne, Its Attorney:

You Are Each Hereby Notified that plaintiff hereby challenges for cause the entire jury panel of this Court and on the 9th day of November, 1942 at 10:00 A. M. thereof, plaintiff will move the above Court, Hon. John C. Bowen thereof, in his courtroom at 7th & Mission Sts.,

San Francisco, California, for an order striking out or quashing the entire jury panel which was to be used for trial of this action and ordering the selection of a new panel on a basis of fair representation to all classes of wealth, occupation, sex and race, and by district representation, after investigation of prospective jurors to determine whether they are connected with or prejudiced in favor of such gigantic corporations as said defendant Southern Pacific Company which continually have litigation pending before this Court.

Said motion will be based upon all the papers, records, and files of this action and upon the Affidavit of Allen Spivock, filed herewith, and upon further affidavits and oral testimony to be offered by plaintiff, and upon the jury lists themselves and all the records and files of the Jury [fol. 59] Commissioner and Clerk of this Court and of the Jury Commissioner of the Superior Court of the State of California in and for the City and County of San Francisco.

Said motion will be made upon the following grounds:

1. That the judges of the above Court have failed to prescribe any rules of qualifications or otherwise for selection of said jury panel as required by law. 28 U. S. C. A. 411 and Calif. C. C. P. 204b.

2. That mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service; that prior to his accident sued upon herein, plaintiff was regularly employed as a wage earner; that by reason of the above plaintiff is being denied equal protection of the laws.

3. That a larger proportion of men jurors are purposely selected, thus discriminating against women jurors.

4. That the selection of said jurors is arbitrary because no examination whatever is made of said jurors before they are put on said panel to ascertain their qualifications or particularly their unfitness by reason of business or other connections with or prejudices in favor of such gigantic corporations as said defendant Southern Pacific Com-

pany which continually have litigation pending in this [fols. 60-61] Federal Court; that the judges of the above Court have failed to provide the necessary facilities or funds to permit proper investigation of prospective jurors as is done in the highest State Court and as is required by law; 28 U. S. C. A. 411 and Calif. C. C. P. 204c, 205.

5. That no effort is made to proportionately or fairly represent citizens of all races on said panel, thus systematically excluding Negroes and Chinese.

6. That no effort is made to apportion jurors by districts when selecting them as is required by law. 28 U. S. C. A. 413 and Calif. C. C. P. 206.

7. That by reason of the above administrative acts of said Jury Commissioner and said Clerk of this Court which may even appear fair on their face, said defendant Southern Pacific Company has been able to prevail in every personal injury action against it, tried by a jury in this Federal Court for the past nine years, and by reason of the above plaintiff has ample and sufficient reasons to fear that it will be impossible for him to obtain the unanimous 12 votes necessary even after it is shown that the evidence and law require a verdict in his favor; that unless this motion be granted, plaintiff will, in *substance and effect*, be denied his right to trial by an impartial jury as guaranteed to him by the Federal Constitution. (Norris v. Alabama, 294 U. S. 587, 589, (1935))

Dated: November 4, 1942.

Allen Spivock, Attorney for Plaintiff.

[fol. 62] [File endorsement omitted.]

[fol. 63] In United States District Court

Affidavit of Allen Spivock on Motion to Strike out Entire Jury Panel. Filed November 5, 1942

State of California,
City and County of San Francisco, ss.:

Allen Spivock, being first duly sworn, deposes and says: That he is the attorney for said plaintiff who seeks damages herein for personal injuries; that plaintiff is sadly crippled for life with both legs amputated and his

left arm immovable as a result of the accident sued upon herein, and he is wholly without funds and is living upon the charity of his relatives; that prior to said accident, he was regularly employed as a wage earner.

That on October 24, 1942 affiant spoke to the Clerk and Jury Commissioner of this Court about the method used in selecting the jury panel to be used for trial of this action which is now set for November 24, 1942; that both said Clerk and Jury Commissioner stated that no rules for the selection of jurors for said panel had ever been prescribed by the Judges of this Court; that, from the city directory and other lists, they select mostly business executives and business men because it is easiest to get them to serve; that labor and working people do not wish to serve as jurors because of loss of their employment time, and therefore no effort is now made to select them as [fol. 64] jurors; that men are mostly selected because they make better jurors and do not give way to sympathy as women do; that they try to get intelligent jurors but no effort is made to examine prospective jurors as to their qualifications before they are selected because insufficient facilities or funds are provided to do this in the way that the Jury Commissioner for the Superior Court of the State of California in and for the City and County of San Francisco does, and thus, it is impossible to check their qualifications or ascertain whether the prospective jurors have connections with or prejudices in favor of such gigantic corporations as said defendant Southern Pacific Company which continually have litigation pending in this Federal Court; that no effort is made to give proportionate or any fair representation on said panel to citizens of other races such as Negroes or Chinese; that no effort is made to obtain proportionate district representation as is done in said State Court; that no effort is made to equalize the business and employment of prospective jurors as is done by court rule in said State Court.

That affiant complained to said Jury Commissioner and Clerk that it is common talk among attorneys and others that a great majority of the jurors selected for this Court are, in various ways, connected with or prejudiced in favor of or so influenced as to favor said defendant Southern Pacific Company, and when affiant informed them that for many years past, all jury verdicts have favored said [fol. 65] Company in all personal injury cases, they ex-

pressed surprise and stated that they did not knowingly select any railroad employees as jurors.

That affiant has checked the records of this Court for the past nine years and finds that said defendant Southern Pacific Company has prevailed in every damage suit for personal injuries or accidental death against it where trial was by jury.

That verdicts for said defendant Company and final judgments thereon in its favor were entered in the following cases asking damages for personal injuries or accidental death:

1. Heath v. Southern Pacific Co., No. 19493 herein, on Oct. 16, 1933.
2. Noonque v. S. P. Co., No. 19496.
3. Kennedy v. S. P. Co., No. 19537.
4. Winton v. S. P. Co., No. 19758.
5. Ericksen v. S. P. Co., No. 19823.
6. Griffin v. S. P. Co., No. 20183.
7. Moore v. S. P. Co., No. 20190.
8. Pilarski v. S. P. Co., No. 20193.
9. Kurtz v. S. P. Co., No. 20216.
10. Merritt v. S. P. Co., No. 20238.
11. Tilford v. S. P. Co., No. 21267. Directed verdict on Feb. 13, 1941.)
12. Borges v. S. P. Co., No. 21346, on July 31, 1941.
13. Tierney v. S. P. Co., No. 21446, on May 23, 1939.

[fol. 66] That the same method of selection of jurors in the above actions was used in the selection of the panel for trial of this action.

That during the past week already 5 of the attorneys for the plaintiff in the above actions tried most recently have told affiant that the jurors in their respective actions were mainly business executives and business men and that altogether too many of them and too many of the other jurors were in some way connected with or subject to influence by said defendant Southern Pacific Company by reason of business, family or other connections, and that therefore, the plaintiff could not and did not obtain a fair verdict; that said attorneys believed that they would have received a favorable verdict if their said cases were tried in said State Court.

That affiant has spoken to numerous other San Francisco attorneys both recently and during the past few

years and the common, accepted and definite opinion among them is that it is practically impossible to obtain a jury verdict in a personal injury case against said Southern Pacific Company or such other gigantic corporations in this Federal Court and that this is primarily due to the manner of selection of jurors in this Court where mainly business executives are selected, whereas, in the State Court a fairer representation of jurors is chosen from all classes.

That in view of the above, attorneys for the plaintiffs in personal injury actions against said defendant company are most fearful of going to trial before a jury in [fol. 67] this Federal Court in cases where they believe a jury should try the facts and none of the many actions for personal injuries on file herein has gone to trial before a jury herein since said case of Borges v. S. P. Co., No. 21346 on July 31, 1941; that within the past few weeks the attorney for the plaintiff in Hubner v. S. P. Co., No. 22107 herein, gladly paid the heavy penalty of some $272.00 merely to obtain a dismissal of said case here so he could file it in the State Court because he was so firmly convinced from actual past experience that said plaintiff could not get a jury verdict in this Court even tho the evidence so warranted.

That with full knowledge of all the above, said defendant Southern Pacific Company has made it a common and regular practice to use every effort to transfer all personal injury actions from said State Court to this Federal Court in order to take the fullest advantage of the above unfair situation.

That plaintiff's action here is of the greatest importance to him as in his seriously crippled condition it is almost a matter of life and death to him whether he prevails here and it would be most unfair and unjust and a deprivation of plaintiff's constitutional rights to force him to present his case before a jury to be selected from said present panel drawn for this case, as such a jury would not give him a fair and impartial trial.

That plaintiff's right to trial by jury is a most important one, especially in this case where the facts are [fol. 68] most unusual and evidence will be sharply conflicting and a fair minded jury may give due consideration to humanitarian as well as strictly legal principles.

Wherefore, affiant prays that said jury panel be stricken out or quashed and that this Court order the selection of a new panel on the basis of fair representation to all classes and by district apportionment.

Allen Spivock.

Subscribed and sworn to before me this 4th day of November, 1942. Sol Peiser, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

(Receipt of service.)

[File endorsement omitted.]

[fol. 69] In United States District Court

[Title omitted]

Transcript of Hearing on Motion to Strike Out Entire Jury Panel – Filed November 3, 1943

Monday, November 9, 1942.

Counsel Appearing:

For Plaintiff: Allen Spivock, Esq.

For Defendant: Arthur Dunne, Esq.

Mr. Dunne: I would like to object to the introduction of any evidence on the ground that the grounds stated in the motion are insufficient as a matter of law; that on their face they do not show any purposeful, systematic or arbitrary exclusion of any member of a particular class because he is a member of that class. Also, because a reference is made, we object to any consideration of the affidavit of counsel as evidence in this matter before your Honor, first, upon the ground that as to the first paragraph the matter is immaterial, irrelevant, and incompetent, and has no reference whatsoever to the selection of jurors here; secondly, as to the balance of the recitals of that affidavit upon the ground that it is apparent on its face that it is [fol. 70] hearsay; and, third, as to the reference to what has happened in other cases that have been tried here is immaterial, irrelevant, and incompetent, and injecting into this a wholly collateral issue which has no bearing on the

question of selection of jurors, which, if the moving papers are sufficient, is the only question that is properly before your Honor.

I simply for the purpose of the record make that objection. Would it be sufficient if the Court reserved a ruling on that?

The Court: I wish to say to both sides that the Court desires a full and complete hearing of all of the evidence on this question, and I will rule upon whether or not the Court should hear it after it is all in. I wish both sides to have the opportunity of producing all evidence that they feel is material on the plaintiff's charge that there was a discrimination here in the selection of the jurors who were qualified.

VINCENT W. HALLINAN, called for the plaintiff; sworn.

Mr. Spivock:

Q. Mr. Hallinan, what is your business?
A. I am an attorney at law.
Q. Admitted to practice in all of the State courts?
A. That is correct.
Q. And also in the United States District Court?
A. Yes.
Q. How many years have you practiced?
A. 22 years.
Q. Have you tried a great many personal injury cases with juries?
A. Yes.
Q. And you have had a fair degree of professional service?
A. At least fair.

[fol. 71] Q. You have tried the case of Harry W. Kurtz v. Southern Pacific Company, No. 20216 in the records of this court, have you?
A. That is right.
Q. You represented the plaintiff?
A. Yes.
Q. The verdict in that case was for the defendant?
A. That is right.
Q. In the selection of the jurors, or in receiving jurors for the trial did you have any difficulty in obtaining jurors who were not connected with the Southern Pacific Company?

Mr. Dunne: That is objected to as immaterial, irrelevant, and incompetent, not within any issue in this case. What difficulty counsel may have had in the trial is entirely immaterial.

Mr. Spivock: We are making the charge here in substance and effect that plaintiffs have been denied an impartial jury, and as proof of that fact we are showing a series of previous cases where other cases have had difficulty in getting a jury that was not in any way connected with the Southern Pacific Company.

The Court: The objection is overruled.

Mr. Dunne: May I add to the objection that it also calls for the opinion and conclusion of the witness?

The Court: The objection is considered and the objection is overruled.

A. The jury in that case was a typical Federal court jury, the type of jury that is here all the time, selected almost exclusively from business executives, wealthy persons: no such thing as a workingman has appeared on the jury, or workingmen's wives, I did not see any in that case; I have never seen the wife of a workingman or the [fol. 72] workingman, himself, on a jury, and in that particular case, if my recollection serves me correctly, there were four people of the persons interrogated on the voir dire who were connected in some way with the Southern Pacific Company, itself. One, I knew was an officer of the Southern Pacific, my impression is two were, and my impression is that two others either had worked for the Southern Pacific Company or had relatives working for the Southern Pacific Company, and the rest of the jurors were persons of the type that it would be almost impossible for the plaintiff in a personal injury case to obtain a verdict.

Mr. Dunne: I move to strike that out as not responsive to the question, as involving an opinion and conclusion.

Mr. Spivock: If your Honor please, the witness is an expert, he has qualified as an expert, and he is entitled to give an opinion in this matter.

The Court: The motion is denied.

Mr. Spivock:

Q. Then it is your definite impression, from the Kurtz v. Southern Pacific Company trial that in the jurors who

were present there on the jury panel there was none who could be classed as a wage earner?

A. None.

Mr. Dunne: For the purpose of the record, that the objection heretofore made to this line of inquiry is that it is immaterial, irrelevant, and incompetent, does not point to any issue which is submitted to your Honor, which is the matter of the method of the selection of a jury, that it calls for the opinion and conclusion of the witness, and is going into a collateral matter, and whatever a particular panel may have been in a particular case has no relevancy [fol. 73] so far as the manner and method of selection of the jury is concerned, and the question of arbitrary exclusion of the laboring class is concerned. May we have that objection pursue this line of inquiry, as well as the fact that any testimony as to the occupation or connection of a particular person is obviously hearsay.

The Court: Counsel for Plaintiff, have you any objection to that? In other words, Counsel for Defendant desires to have an objection running to all this line of inquiry without repeating it.

Mr. Spivock: I have no objection to counsel having the objection without repeating it. I will agree to that.

The Court: The Court approves it. The objection is overruled.

Mr. Spivock:

Q. In other words, there were no wage earners on that particular jury panel that came before you for trial jurors to be selected from?

A. None that I can remember. My impression is that there were not any.

Q. And the occupations of the others, do you remember particularly what they were?

A. I can't remember them definitely. The panels in the Federal court and the consistency of that jury was typical. The jury is selected almost entirely from business people, executives, persons of that type.

Q. The other jury cases that you have tried up there, personal injury cases, have you won those cases?

A. No.

Q. There was a verdict for the defendant in each case?

A. That is right.

Q. In all of those cases that you tried, did you feel that if you tried the same case before a jury in a State court you would have won the case?

A. Yes.

[fol. 74] Mr. Dunne: That is objectionable beyond the other objection I made.

The Court: That objection will be sustained.

The Witness: I might say, as to the merits of that Kurtz v. Southern Pacific Company case——

Mr. Dunne: If your Honor please, are we going into the merits of that case?

The Court: Do you wish to respond to that objection, Counsel?

Mr. Spivock: I might ask one question and dispose of it.

Q. Mr. Hallinan, did you feel that the evidence warranted a verdict in favor of the plaintiff in that case?

Mr. Dunne: I object to that.

A. Emphatically, especially in the Kurtz case, it was a very clear case for the plaintiff. As the case started I was a little dubious about the evidence, but the evidence produced by defendant, and especially records we got into evidence, coming out of the company's records, seemed to me to establish conclusively a case. The jury was out for an hour and I would have bet any of the boys that the jury was going to bring a verdict in for the plaintiff; and was astonished when they brought in a verdict for the defendant.

Q. You lost the case?

A. Yes.

Q. You also appeared as attorney for the plaintiff in the case of Hubner v. Southern Pacific Company?

A. Yes.

Q. You made a motion in the Federal court for leave to dismiss in order that you might file that case in the State court?

A. Yes.

Mr. Dunne: I object to that.

[fol. 75] Mr. Spivock:

Q. When you made that motion was it granted?

A. Yes, it was granted conditionally. I had not filed the case originally, but it was filed by another counsel in the State court. The case was transferred into the Federal court and then the attorney who brought the case entered the Army, the case was turned over to me, and I did not see that the case could be remanded, there was no ground for remanding, so I moved to dismiss the case for the purpose of filing in the State court, Judge St. Sure made a conditional order that the case would be dismissed without prejudice if we would pay $250 counsel fees and the costs of the case. I wrote a letter to my client, and this is before I even heard of your matter at all: I have the copy of the letter here, and I said to her substantially what this situation was. The man worked in a shipyard, they are not rich people, and he did not want to spend money unless necessary, and I said, "I believe that at least in Dolores' case we have a very good chance of recovering a judgment against the Southern Pacific Company in a State court." Dolores was a little girl who was riding with her mother at the time of the collision. I said, "But I would have no hope of recovering a judgment in the Federal court, and I believe that the best thing to do would be to pay them the $271.50 and file an action in the State court. It is unfortunate that this condition has arisen, but it is due to the fact that the operators of the train were not sued in the original action and the case could not be maintained in the State court. Please advise me at once as to your desire in this matter. If you do not care to pay the $271.50, I may be able to get the Court to change its order so as to [fol. 76] not dismiss the case with prejudice and it still would remain in the Federal court. However, I would not care to try it, myself, in that jurisdiction, as I believe that the juries in the Federal court are so selected that they always will favor the Southern Pacific Company, and that it is almost impossible to win a verdict against them there." I wrote that letter on October 20, 1942.

Q. That was long before anyone spoke to you about this case, at all?

A. Yes, and the people put up $271.50, which was paid to Mr. Dunne, and filed a case in San Mateo County, naming the conductor, engineer and fireman of the train.

Q. This $271 was paid how long ago?

A. That was paid just a few days ago, and I had an agreement with the people that they were to pay the costs in that case, and I agreed with them if they would pay $271.50 to get the case out of the Federal court I would pay the costs in the State court, because they could not afford to pay both.

Q. Are there any reasons you have other than those set forth in your letter why you would pay $271.50 to have the case dismissed and go to the State court?

A. If I were trying a case in the Federal court I would not take a jury under any circumstances, in a damage case, any more. The difficulty of winning those cases before judges is known to everyone, but you have a much better chance with a judge in the Federal court than with a jury. The jury is so constituted that it seems to be prejudiced, that they have a conviction against cases of this kind; people of that caliber won't give damages to injured persons. A somewhat similar problem arose some years ago in the City and County of San Francisco.

[fol. 77] Mr. Dunne: If your Honor please, we are not comparing it with the difficulties in the State court.

The Court: That objection is sustained. Proceed by question and answer.

Mr. Spivock:

Q. Are there any other reasons that you have for paying that penalty rather than proceed in the Federal court?

A. No other reason than——

Q. (Interrupting:) That is, other than you have already mentioned?

A. Except the conviction that trying a case before a jury in the Federal court would be a waste of time and effort.

Q. And money?

A. Yes, it would be thrown away.

Q. Have you had occasion to check on the number of wage earners in San Francisco?

A. I did that in 1937, that is, in proportion to the other persons. At the time I secured from the Building Trades Council the estimate that there were 40,000——

Mr. Dunne: Just a minute, I think as a result of that inquiry with regard to the number of wage earners in San

Francisco in proportion to the others, that is objected to as calling for hearsay.

The Court: Do you have the basis of that estimate?

A. Yes.

Q. Is it a written report of some kind?

A. No, this is an affidavit I made which was based upon the estimate secured from the Building Trades Council.

Q. Was that taken from records of the Council?

A. Yes. They had 40,000——

The Court: The objection is overruled.

A. 40,000 persons who were members of the allied building trades, and 60,000 laborers and skilled mechanics outside of the building trades, so they had a hundred thousand [fol. 78] hired men. The population of the city at that time was about 635,000, and taking merely all the laboring classes as against the other persons whose records I also got from insurance people, etc., about three-quarters of the population of the city were either working people or members of their families.

Mr. Spivock: I believe that is all.

The Court: Any cross-examination?

Cross-examination.

Mr. Dunne:

Q. Mr. Hallinan, you did not make a motion for a new trial in the Kurtz case, did you?

A. No, I lost it on the trial, the way it went, I would have despaired of winning it in the same court before another jury.

Q. Do you remember the names of any persons on that jury?

A. No.

Q. Do you remember who you described as an officer?

A. I do not.

Q. Do you remember who anybody else on that jury was?

A. Their names now?

Q. Yes.

A. That is some years ago. I have tried perhaps a hundred cases since then.

Q. Or the business of any of them?

A. I couldn't remember that.

Q. Or the business of anybody else on the panel from which the jury was finally selected?

A. No, I couldn't remember.

Q. Or even whether you exhausted all your peremptory challenges?

A. I don't know that.

Mr. Dunne: No further questions.

Mr. Spivock: May this witness be excused so he can return to *this* business?

The Court: Does counsel object to this witness being excused now?

Mr. Dunne: No, he may be excused.

[fol. 79] CLIFTON HILDEBRAND, called for the plaintiff; sworn.

Mr. Spivock:

Q. Mr. Hildebrand, you are admitted to the practice of law in all of the courts of the State of California?

A. Yes.

Q. For how many years?

A. About twenty years.

Q. You are also admitted to practice in the United States District Court over that period of time?

A. Yes.

Q. You have recently tried—that is, not recently, but a few years ago tried the case of Merritt v. Southern Pacific Company, No. 20,238, in the files of this court?

A. Yes.

Q. And there was a verdict for the defendant in that case?

A. Yes.

Q. Did you feel from the evidence presented on its merits that you should have won that case?

Mr. Dunne: May I repeat and have the same objection pursue this line of inquiry?

The Court: Yes; the objection is overruled.

A. Yes. Might I explain that this was a passenger case, and the passenger was injured on the premises of the company, and it was a type of case that ordinarily there would be no question of a recovery on.

Mr. Spivock:

Q. You feel that you could have won that case?

A. Yes.

Q. Did you notice the type of people on the jury panel that was presented to you?

A. Yes.

Q. Will you describe what you noticed as to their occupation?

A. Well, it was a typical jury in this Federal court, they were all big business men, contractors, insurance company [fol. 80] executives, practically all of them from California street or Sansome street, hardly any of them from the humble walks of life, no laboring people, at all.

Q. Were there any women on that jury.

A. No.

Q. There were no women, at all?

A. No.

Q. There were no wage earners or working class people on that panel, at all?

A. None. There might have been a clerk, but I am not sure. I tried many cases in the Federal court here and I do not recall of having anybody from any of the laboring class, like carpenters or their wives, or bricklayers, or shoe clerks, store clerks, nobody at all from any of those, no one except business executives with an occasional clerk, perhaps, from some of their offices.

Q. In the cases where you have found a clerk on the jury it has always been from one of the big corporations?

A. That is my recollection of it, some tied in with the Southern Pacific, or some insurance company, or a railroad.

Q. You have also tried a great many personal injury cases in the State court?

A. Yes.

Q. And you have had a fair degree of good success in those cases?

A. Yes.

Q. About how many cases have you tried, personal injury cases have you tried in the Federal court?

A. I used to try a great many under the Federal Employers' Liability Act. I represented some of the Railroad Brotherhood and over a period of years I have tried quite a few; I would say probably twenty-five.

[fol. 81] Q. Directing your attention particularly to the past ten years to bring it within recent history, have you won any jury verdicts in those cases in the Federal courts?

A. Yes, we got $1000 in one case where the damages were about $6000 against the Southern Pacific Company, and the judge promptly granted a new trial for inadequacy of the damages.

Q. However, that was more than nine years ago, was it not?

A. Well, it was nine or ten years ago, something like that; it might have been a little longer.

Q. Was there any case within the past eight or nine years, let us say, where you have secured a jury verdict?

A. No, I do not recall any.

Q. How many jury verdicts have been returned for plaintiffs you represented?

A. I think two. I finally had to stop trying them.

Q. What was your reason?

A. I did not think we could get a fair trial for the kind of people I represented, laboring people and members of the Railroad Brotherhood who were injured while employed by the railroad, and seamen's injuries. I found that we did not get a fair trial, in my opinion, with big business men judging their rights, insurance men and big executives; that the same cases that could be won in the State court would be lost in the Federal court.

Q. Then is it your present opinion that you would not care to try any person- injury case in the Federal court at the present time with the present jury set-up?

A. Not unless I absolutely had to.

Q. You think it is almost impossible to win?

A. Yes, I do, unless it is just an open and shut case. If it is an open and shut case I think the Federal jury will [fol. 82] sometimes give more than the State juries. That is the only exception that I would make.

Q. However, in the average case, where there is always some doubt involved, you feel that the jury will always favor the defendant?

A. Yes, if they can find any possible reason they will go for the defendant, in my experience.

Q. Have you had occasion to check the number of working people in Alameda County?

A. Yes. I am the attorney for the Building Trades Council, and I am also attorney for many of the Railroad Brotherhoods, and I know approximately what their membership is.

Q. What would you say their membership is in Alameda County?

A. The Building Trades mechanics in Alameda County have a membership of about 40,000, and with the influx of the shipyard workers there are about 30,000 or 40,000 additional who are not affiliated directly, or who have just an indirect affiliation, so there are about 70,000 building trades mechanics working in Alameda County at the present time; there are about 50,000 in the Central Labor Council, and there are about 25,000 employees operating with the different railroad brotherhoods, and with their families they constitute fully 85 per cent of the population of some 300,000.

Mr. Spivock: That is all.

The Court: Any questions, Mr. Dunne?

Cross-examination.

Mr. Dunne:

Q. Mr. Hildebrand, you did not try the Miller case, yourself, did you?

A. Well, I was in and out. Mr. Sykes was associated with me on it, and it was my responsibility. I think Mr. Sykes did most of the work. I was in and out there, and saw the jury selected.

[fol. 83] Q. That was a case where a woman slipped on the floor?

A. On a bottle of whisky.

Q. At the Ferry Building?

A. Inside of the premises of the company.

Q. That is premises rented by the company?

A. Yes.

Q. Where a stranger had left a bottle of whisky?

A. Yes, it was being cleaned up and she had not been warned about its being there.

Q. And the janitor was in the process of cleaning it up at that time?

A. Yes, and was standing right there and did not warn the lady.

Q. Do you recall any particular juror on that panel?

A. Yes, there were insurance men from some company, some executives.

Q. Anybody else that you remember?

A. Yes, there was some big importer who did business with the railroad.

Q. Anybody else?

A. There were three or four other big business men and a retired high Army officer.

Q. Anybody else that you recall?

A. There were certainly no labor people from Alameda County or San Francisco County on the jury, or on the panel.

Q. Did you make an investigation of that panel?

A. Yes, I made an investigation of everyone whenever I tried a case out here.

Q. No motion for a new trial in that case was made?

A. I would not remember that.

Mr. Dunne: I have no further questions.

Mr. Spivock: That is all. May this witness be excused from further attendance?

Mr. Dunne: Yes.

[fol. 84] WALTER B. MALING, called for the Plaintiff; Sworn.

Mr. Spivock:

Q. Mr. Maling, you are the Clerk of this Court?

A. I am.

Q. And you have been for how many years?

A. About thirty years last past.

Q. As part of your duties, you select half of the names of the trial jurors for this Court?

A. I do.

Q. And the other half is selected by a jury commissioner?

A. That is correct.

Q. And Mr. Mikulich is at the present time, and has been for some time the other commissioner?

A. He has been since the death of Mr. Cummings, I don't know how long, two or three years.

Q. The last few years he has selected the other half?

A. Yes.

Q. Do you recall, Mr. Maling, that I came in to see you on [fol. 85] October 24, 1942, in your office—I came into your office on Saturday morning, October 24, of this year?

A. I remember you were in there recently.

Q. And asked you about the method used in selecting jurors?

A. You consulted me about it, yes.

Q. I asked you how you selected jurors?

A. Yes.

Q. You said to me at that time that you selected mostly business men, is that correct?

Mr. Dunne: That is objected to. The Clerk is here and the question should be put to him directly as to what is done and not what he said at sometime.

The Court: I think so. If you wish to lay the foundation for impeachment that is another matter. The objection is sustained.

Mr. Spivock:

Q. Will you explain the method used in selecting trial jurors for this Court.

A. My method, generally speaking, is to take the City Directory and select the names of people who I think, from their occupation and residence, would be intelligent people to act as jurors in this court.

Q. And in making that selection do you make any effort to select mostly business men?

Mr. Dunne: That is objected to as calling for his conclusion. I think Mr. Maling ought to be asked what he did without characterizing somebody as a business man.

The Court: Find out what he did, first.

Mr. Spivock:

Q. Mr. Maling, you stated that you used the City Directory. Do you use any particular method as to the type of [fol. 86] men that you select?

A. No. If you mean by that do I see what organization or what company they are associated with, if that is what you mean, that does not enter into it, at all.

Q. Is there any effort made—I do not want to put conclusions in your mouth, but is there any method that you use relative to selecting jurors on the basis of their occupation?

A. Yes, I avoid those whom I understand to be disqualified, physicians, and pharmacists, and telegraphers who operate trains, and those various ones that are mentioned as being, as I understand it, disqualified from serving. I don't know that that is the right word; it may be it is merely ground for excuse. I do not know which it is, but I avoid those people; I observed that the judges always excused them on the ground that they should not be compelled to serve, and that includes physicians and school teachers, ministers of the gospel, and such, state and federal officials, and all that class of people. Whenever I see that occupation against their names under those heads I do not put them in, because I feel sure the Judge would not accept that person as a juror.

Q. In going over these lists to pick out the trial jurors, are you interested at all in what their occupation is?

A. No, I do not think so, I do not recall that I ever had any occasion to select because of the occupation.

Q. Well, hasn't there been any effort, or haven't you tried to select business men particularly?

A. Well, people that are working, not necessarily, but [fol. 87] very often that is a guide to me as to the possible age of the person. If he is working as a clerk for Hale Bros., or the Emporium, I feel that he probably is the right age where he should serve, and that is the only way that I can recall now that the occupation would have anything to do with it.

The Court: We are not getting to the main point. You might ask him if he makes any preference between occupations of any kind.

Mr. Spivock:

Q. Is there any preference shown by you in regard to different professions in the making of these selections, or different occupations?

A. I think probably if I say this it will be an answer to your question; if I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of

those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out.

Q. The City Directory gives the occupation of each person, does it not?

A. It usually does.

Q. In looking through the City Directory, if you saw the name of a man that was a carpenter, would you select that man?

A. I would not leave him out, no, not necessarily because [fol. 88] he might not be a carpenter who was dependent upon day labor; he might be employed by the month by some outfit that I would not know anything about, and it would not make any difference to him financially, and my idea is where it is going to affect them financially, a day laborer, it is unfair to require such men to serve, and in order to avoid having the names of those men in the box I would leave them out. The name carpenter would not necessarily indicate that he was a man dependent on his day labor.

Q. In other words, if you thought the man was dependent upon day labor you would leave him out?

A. If I felt sure of it, or felt quite sure of it, I would avoid it for that reason, solely for that reason.

Q. If you saw a man listed as a laborer would you select him as a trial juror?

A. I imagine, I would think I would not put him in; I would assume that he was a day laborer, paid according to his work, and he would be deprived of his income if he had to serve here.

Q. If a man was listed as a janitor, would you select him as a trial juror?

A. Oh, yes, we have had janitors here a number of times.

Q. You have had?

A. Oh, yes, I always have. I think of a janitor as a man who is being paid by the month and he would not come within my opinion of a man who would suffer any from being called in.

Q. Do I understand that your effort has been to eliminate day laborers or people that are paid by the day rather than [fol. 89] by the month?

A. They will give that as a reason for not serving, and if they do my experience has been that every one of the judges has always excused those men who said they could not afford

to come here and give up their $10, or $12, or $15 a day for the $4 a day that the Government pays them.

Q. If a man was listed as a mechanic, would you select him as a trial juror?

A. Oh, yes, I would not leave him out on that ground.

Q. You said you would not leave out a janitor, you would not leave out a mechanic, and a carpenter you would not leave out if you thought he was the owner of the business, or worked for a monthly salary, or something of that kind.

A. Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out.

Q. Now, as a matter of fact, in going over the City Directory to select the names of the jurors who have been impaneled the other day for the trial of his Thiel v. Southern Pacific Company case, have you selected anyone on this list who is a mechanic?

A. I don't know what list that is, but, of course, my attention was called to the fact that when the venire was issued, when the venire came in and was returned, it happened that there were a good many on that venire who gave the excuse that they could not afford to serve as jurors on account of losing their pay, that a good many of them were laborers in shipyards and other places, where the Govern-[fol. 90] ment would be losing workmen that they needed for war work, and we had quite a few of those, so I was told, I was not in the courtroom.

Q. Are you speaking of the present list?

A. I am speaking of the venire from which these men that are now serving in this term were selected. You see, we issue a venire for say two hundred, and of that number maybe 150 will come in the first day to be examined as to their qualifications, and at that time they are given an opportunity to give excuses, or reasons for being excused from service, and I was told by my deputy who was in the court-room that there were a number of them who appeared at this time that said that they should not be required to serve for that reason.

Q. Mr. Maling, let me ask you this: You said that you did select some janitors, and some mechanics, and some carpenters. Will you state about what proportion?

A. I have no idea. It would be a guess, and it would not be worth anything.

Q. Would it be a fair statement for me to say this, that of the persons that you select the number of men who might be mechanics, janitors, or of the labor class, is a very small percentage. Would that be a fair statement?

A. Well, I don't know—it would be a small percentage, yes, it would not be the major percentage.

Q. In other words, the major percentage would be what type of occupation?

A. The major, I should say, would be men in business, or their wives; who are not too old to have been retired, and old enough to have responsible positions.

[fol. 91] Q. In other words, it is very clear, then, that the vast majority would be business people and their wives?

A. I do not say vast, I think the majority.

Q. And the number of wage earners or labor people who are paid by the day would be a small percentage, compared to the others?

A. Yes, I try not to put them in.

Q. In other words, you purposely leave them out for the reasons that you have stated?

A. For the reason I have stated.

Q. Now, in selecting the women on the jury, that is, between the women and the men do you try to get an equal number of each?

A. No, I do not try to do anything of the sort; I do not pay any attention to the proportion, to the percentage.

Q. Are there any rules prescribed by the judges, that they have given you, for the method of selecting jurors?

A. No rule of court.

Q. Have you ever selected any Negro on the jury panel?

A. Oh, yes.

Q. How long ago was that?

A. I don't remember, but I know we have had them.

Q. Can you recall the last time that you had one?

A. No, I cannot. You see, in the last ten or twelve years I have not been in the court-room, I have not done court-room work, and it would not attract my attention, and I would not know whether they were white or Negro.

Mr. Dunne: For your information, there is one on this panel.

[fol. 92] The Court: Might I ask in this case is the plaintiff a member of the Negro race?

Mr. Spivock: No, the plaintiff is a member of the white race.

The Court: Do I understand you to say that the plaintiff belongs to the Caucasian race?

Mr. Spivock: Yes, that is correct.

The Court: In other words, he is the type ordinarily referred to as a white man?

Mr. Spivock: A white man or Caucasian.

Q. Have there been any Chinese citizens selected on the jury panel, that you can recall?

A. I think so.

Q. When was the last one?

A. I cannot tell you, I would have to check up with some of my deputies, but I feel quite sure that just a short time ago one of my deputies spoke about the fact that we had a Chinese merchant, I think, on our jury panel.

Q. Are you aware of the fact that there are over 2,000 Chinese citizens here in San Francisco?

A. I do not know anything about it, I do not know the number; of course, I know about Chinatown, I know there is a large number of Chinese, but I imagine most of them are not native born citizens.

Q. There are over 2000 native born citizens.

A. I have no knowledge on that.

Q. Is any effort made to apportion the jurors by districts?

A. No.

The Court: At this point we will take a recess until 2 o'clock.

(Recess taken until 2:00 o'clock p. m.)

[fol. 93] Afternoon Session—2 o'clock, p. m.

The Court: You may resume the stand, Mr. Maling, I think the plaintiff has not finished yet.

Walter B. Maling, Recalled;
Direct examination (resumed).

The Witness: He said he had one more question he wanted to ask me.

Mr. Spivock: Q. Mr. Maling, I believe the last question was with reference to whether you apportioned the jurors among the different districts, and what was your answer?

A. We have never done that.

Q. You never paid any attention to that?

A. No.

Q. Do you make any investigation of the jurors before they are selected, with regard to their qualifications?

A. No.

Q. In other words, you have no idea whether a man is an exconvict, or not when called into court?

A. No, not even as to whether he is a citizen of the United States, we make no investigation, at all we have no facilities for doing so.

Q. In other words, there is no consideration, or have you given any consideration to the Code of Civil Procedure of California, Section 198, regarding competency of jurors? Have you considered that, at all?

A. No.

Q. Have you considered Section 199 of the same Code?

A. I have not considered anything in the Codes of California, except as I said earlier in my examination, as to [fol. 94] certain exemptions or disqualifications. I remember the Federal statute says the same qualifications or disqualifications that are in the State shall apply in the Federal Court, and that is the only thing I have been interested in.

Q. Do you follow Section 200 of the California Civil Code, which states persons who are exempt and lists fourteen of them?

A. I don't know what you refer to.

Q. Section 200 of the California Code of Civil Procedure, which provides that persons shall be exempt from jury duty.

The Court: He covered that this morning, did he not?

A. Yes, I tried to.

Q. Those that were exempt by the State statute.

Mr. Spivock:

Q: You have at no time talked to the jury commissioner of the State Court, as pertains the procedure there?

A. No.

Q. You are not familiar with the rules prescribed by the Superior Judges regarding selection of the jurors?

A. No.

Q. You are not familiar with that, at all?

A. I am not familiar with that, at all.

Q. You are not familiar with the present rule of the Superior Court?

A. No, I don't know anything about their rules.

Q. Now, the testimony that you have given in this case with regard to the method used in the selection of jurors, that applies to the methods which were used in selecting the jury panel that was just sworn in the other day, of about 180 for the trial of this case?

A. Of course, we don't select those names, you know.

[fol. 95]. The Court: The point of the inquiry, as I understand it, is whether or not what you said applies to the jury list from which those names were taken.

A. Oh, yes. There are never less than 300 in the jury box when the names are drawn out.

Mr. Spivock:

Q. In other words, the same procedure that you testified to has been followed many years, up to the present time?

A. All the time since I have been clerk.

The Court:

Q. Specifically, does it apply to the names of the jurors now in the jury box, and from which the present petty jury was summoned and selected?

A. Yes, it does.

Mr. Spivock:

Q. Would it be a fair statement that at least 50 per cent of those jurors are business men, or their wives?

A. Well, I have not looked over that list, but I should think, from my general knowledge of the names that we have had in our box from year to year, it must be about that.

Q. At least that?

A. But I have not examined this particular panel.

Q. I appreciate that, but as a general rule?

A. I would expect that it would be about that.

Q. Then it is a fair statement that by that same method you have followed here the general average would be at least that, there would be at least 50 per cent of this panel who are business men, or the wives of business men?

A. I should think so.

Q. About what percentage of those would you say would be wage earners or laboring people?

[fol. 96] A. About 20 per cent, maybe more than that, wage earners.

Q. Wage earners and laboring people?

A. All of the rest of them—the balance, whatever it would be, if it was 50 per cent for the first lot the rest of them would come under the category of labor, laboring people and wage earners.

Q. Did I understand you correctly—you said that you left out all wage earners and laboring people. Would you explain that?

The Court: Ask him if he said that.

Mr. Spivock:

Q. Did you say that?

A. No, I did not say that, at all. You mean in my testimony heretofore, that I have said that?

Q. Well, would you state what you did say in regard to the excuse of wage earners?

A. I said that day laborers who were dependent upon their daily wage and were getting $10 or $15 a day would always be excused, in my observation, if they came up here and were required to serve as jurors in our court at $4 a day, and so I did not put in the names of those men I thought would be in that category. Now, you are not talking about that class of people, but you are talking about people who are wage earners as distinguished—whose compensation is not a daily wage.

Q. I think we are getting a little confused, here. When I asked you what percentage was business people I had not in mind not only people who were owners of businesses, but business executives and employees of large companies, and those who were getting large salaries, as distinguished from the poorer wage earner. Do I understand you, Mr. [fol. 97] Maling, to say that you had selected primarily mostly business men and business executives, is that true?

A. Well, not business executives—if you mean by that

that I went out of my way to select a large number of the officers of companies, if that is what you mean by an executive, I never have done that; I have just taken people that were employed by reputable business houses whose reputation I knew during the years that I have lived here.

Q. Those are people who have responsible positions, with good salaries, is that correct?

A. I guess they do, I don't know about that. I assume they would not be there if they did not.

Q. In other words, at the time that you selected those people, as you say, that were working for responsible firms, it was known to you, was it not, that those people that you were selecting for the jury were people who had responsible positions, and had pretty substantial salaries?

A. I believe that they did have, yes.

Q. And the jurors selected by you were mostly from that group, is that true?

A. A portion of them, not mainly; I would say half. I estimated a while ago it is 50 per cent.

Q. You think at least 50 per cent?

A. I think so.

Q. Didn't you tell me when I spoke to you in your office on October 24, 1942, that you selected mostly business men?

A. If I put it that way if I said it that way to you, it was not my intention to convey the idea that I was only selecting the heads of business organizations.

Q. No, I did not understand that you were selecting [fol. 98] merely executives. I understood you, just as you say now, that you were selecting people who occupied important positions in business firms, or were in various businesses, regardless of whether the largest, or not.

A. Also their employees, who were salesmen and saleswomen, and that sort of thing, the clerks, and bookkeepers, and all that sort of thing. I took all of those people. I did not intend, when I used the word businessmen, to have you get the idea that I meant all presidents, vice-presidents of a corporation, or anything like that.

Q. I did not understand you to mean merely presidents of a corporation, because we know for a fact that is not the jury system, but in selecting these clerks and sales people, is it not a fact that they are mostly connected with the bigger corporations or working for the bigger corporations?

Mr. Dunne: That is objected to as immaterial.

The Court: The objection is overruled.

A. No; they are working for all sorts of merchandise, big and little, if that is what you mean, the size?

Q. During the recess, Mr. Maling, have you discussed your testimony here with Mr. Dunne?

A. No.

Q. Were you talking with him at noon?

A. I introduced Mr. Mikulich to him as we went out. I don't remember whether I said another word to him.

Q. You were talking together during the noon recess with Mr. Dunne, were you not?

A. No.

Q. You introduced Mr. Mikulich to him and you said nothing?

[fol. 99] A. That is as we went out at twelve o'clock, when Mr. Mikulich and I walked out, and Mr. Dunne walked out behind me, and Mr. Mikulich said, "Are you going down town?" And I said, "No." I called to Mr. Dunne and said, "This is Jury Commissioner Mikulich, Mr. Dunne," and I think he responded by saying he knew him, or something like that. I did not have any conversation with Mr. Dunne about the subject of this matter, here, about jurors; I do not think I had any conversation with him, at all, as a matter of fact.

Mr. Spivock: I think that is all.

Cross-examination.

Mr. Dunne:

Q. Mr. Maling, before we get to the matter of getting the names of the jurors, it has been the practice, wherever the names were gotten from, to have at least 300 names in the jury box.

A. Yes.

Q. Isn't that correct?

A. We would always have more than 300, so that at the time of drawing we would never be short.

Q. Do you draw from that same box both the names for the grand jury and for the petty jury?

A. Oh, yes, they all come out of the same box.

Q. After the names have been drawn for the petty jury, those persons whose names are drawn are then summoned by the Marshal, isn't that the practice?

A. Correct.

Q. And after they are summoned by the Marshal they are then brought before one of the judges, is that correct?

A. That is correct.

Q. On questions of qualifications and excuses, is that not [fol. 100] correct?

A. Yes.

Q. And at that time has it been the uniform practice for the judge who is presiding to state to them as to the qualifications, and ask if there are any who do not have the necessary qualifications?

A. Well, I can only answer that—as you know, for some years I have not been going into the courtrooms, but in the days when I served under Judge Van Fleet, in the courtroom, he had practically that method of examination, and heard the excuses of jurors. I think he usually had the statute before him, and if he did not he had notes of it, and would recite to them what he was going to consider as proper excuses, and there was no use for them to make any that were not under that category. I think the judges now follow that same practice.

Q. At least, so far as you know that has been the practice?

A. Yes.

Q. Since then and since you have no longer been active in the court-room?

A. Yes.

Mr. Dunne: If your Honor please, we should like to call one of Mr. Maling's deputies to indicate that has been the practice, and that it was the practice with this particular panel.

The Court: The Court will give both sides an opportunity to call such witnesses as they may wish to call.

Mr. Dunne:

Q. This practice that you have described, in selecting the list of names that go into the box, is a practice that you have followed for some years, is it not?

[fol. 101] A. Yes, I have always followed it. I have followed it since I have been Clerk here, and I followed it when I was Clerk in Hawaii.

Q. As a matter of fact, in this very court there have been similar motions directed at the jury panel, have there not?

A. Well, we had one about a year ago right in this court-room, when Judge Welsh was sitting here, in which they challenged the entire panel, but I do not recall any other.

Q. As a matter of fact, Judge Welsh overruled that challenge, did he not?

A. Oh, yes.

The Court: Do you remember the point involved?

Mr. Dunne: It was the same general point.

Mr. Spivock: No, I will have to object, it was a different type of challenge. That was a criminal case.

The Court: Was this same question passed upon by Judge Welsh?

Mr. Dunne: It was not entirely the same.

The Court: Did Judge Welsh happen to file a written opinion or decision?

Mr. Dunne: I think not.

Q. The practice that you have followed and the practice that was followed in respect to this particular panel that has now been called and sworn to serve is the same practice you followed in the matter that Judge Welsh passed upon?

A. Oh, yes.

Mr. Spivock: I will object to this line of questioning because the ruling by Judge Welsh was as to a different matter. I have no objection to your Honor examining the [fol. 102] points of law involved if your Honor desires to get information that way, that is perfectly in order, but putting that in evidence as part of this proceeding I think is entirely out of order.

The Court: I believe the objection will be overruled. I am inclined to think that it is only fair to let Mr. Dunne ask such questions since the court overruled Mr. Dunne's objection to your question to Mr. Halfman and Mr. Hildebrand concerning their experience and other things relating to their practice. I think it is entirely fair to let the question stand and it is so ordered.

Mr. Dunne:

Q. Mr. Maling, you were asked some questions this morning about this particular panel, and if I remember correctly you said you were not in court when Judge Roche

examined the venire, the men on this particular venire, is that correct?

A. That is correct.

Q. Who is your court-room clerk who was serving at that time, if you know? Was it Mr. Calbreath?

A. I think it was Mr. Calbreath. Mr. Welsh is the court-room clerk for Judge Roche, but it is my recollection that Mr. Calbreath went in on that case, because it had been intended that Judge St. Sure would examine those jurors, and he was ill that day, and Judge Roche did it for Judge St. Sure. I am quite sure it was Mr. Calbreath.

Q. You were asked a short time ago whether or not you paid any attention in the selection of names to go into the box to districts. Let me ask you this, have you ever intentionally or deliberately excluded a resident of any particular district?

[fol. 103] A. No.

Q. When you say you paid no attention to districts, you mean it made no difference to you, at all, isn't that correct?

A. Oh, yes. I thought he meant I would take a certain percentage from one precinct and a certain percentage from another precinct, and work it out mathematically so that we would get some percentage from all over the division, and when I said no, I meant it in that sense. Of course, I do this, if I see the name of an employee of a company who is a resident of Sacramento, I do not put his name in, because I know that he does not reside near here, and even if he could serve the Judge would never require a man to come down from Sacramento, or from a long distance. I do not go beyond San Jose, ordinarily; on the one hand, and San Rafael on the other.

Q. Is that a practice that you have followed with the approval of the judges of this court?

A. Oh, yes. I was instructed to do that.

Q. So that you can say that there has never been a purposeful exclusion of residents of any city or town or part of a city or town, isn't that correct?

A. So far as I am concerned, that is absolutely correct.

Q. Now, has there been any purposeful exclusion of Negroes or Chinese?

A. No.

Q. Has there been any purposeful exclusion of men who worked with their hands, just because they worked with their hands?

A. Never.

Q. Or any exclusion of men of small salary, whether by [fol. 104] the day or otherwise, simply because their salaries are small?

A. Never.

Q. Has there ever been any exclusion of any person simply because he was poor?

A. Oh, no.

Q. Has there ever been any exclusion of any individual who worked at any particular trade simply because he worked at that trade?

A. No.

The Court: You have spoken of longshoremen.

A. I did that simply to illustrate a man who I knew was getting nothing but a daily wage, that was not employed regularly, that was only paid for the time that he put in. That is what I meant. I used that as an illustration to illustrate those men whose earnings depend entirely upon the number of hours that they work; every hour that they lose coming up here to serve as a juror they lose that much. There is nothing to compensate them but $4 a day as against $10 a day at their work.

Mr. Dunne:

Q. Have you ever excluded a longshoreman just because he was a longshoremen?

A. No.

Q. I assume that a man engaged in loading and unloading freight from vessels and railroad cars and trucks, when on a monthly wage instead of an hourly or daily wage, you would not exclude his name from the box?

A. No. I think we have got on this jury panel, I do not think it is a longshoreman, but I think we have a laboring man on this panel right now who is not a wage man, but is an officer of one of the unions. I may be mistaken about that, but I am quite sure that we have.

[fol. 105] Q. And this distinction that you have made is not on the basis of earnings, or wealth, or character of work, but is a distinction based on whether or not a man will be excused because he will lose money.

A. That is the only thing that governs me at all in excluding any of them.

The Court: In that connection, this morning you spoke of war work that some persons are now doing. Has that been accentuated in latter months, or has that been constant?

A. As a jury commissioner, I do not think I would know whether they were on that, or not, but I *think* I *mentioned* that in connection with the fact that the judges let them off if they are engaged 75 or 95 per cent in war work. We had quite a few jurors in the last term, and one of them came in to see me about how he could be excused, and wanted to know how he could do it. I found out what his reason was, that he was working almost entirely; I think he said, 90 per cent on Government contracts, and I told him he could tell the judge that and it would probably be a good reason for letting him off.

Mr. Dunne:

Q. If I understand you, Mr. Maling, if a man is known not to be qualified under the rules of qualifications under the statute, you will not put his name in the box?

A. I never put it in if I know he is disqualified.

Q. You endeavor not to get people so old that by reason of their physical condition they cannot serve?

A. That is correct.

Q. One other thing, you aim to keep names out of the box of persons who, either by reason of exemption of the State statute, or by reason of the practice, here, that the [fol. 106] judge would excuse if and when they came to be sworn?

A. Those are the only ones that I endeavored to keep out of the box.

Mr. Dunne: That is all.

Re-direct examination.

Mr. Spivock:

Q. Have you made any endeavor at all in your jury selection to get a cross section of the people of San Francisco with regard to their wealth or financial means?

A. No, I have not, I don't know how I would do it.

Q. You have made no attempt along that line?

A. No.

Q. When you said you left longshoremen off the list, you purposely left longshoremen off the list for the reason you gave?

A. I only used that as an illustration. I might have taken some other line. I don't know what it would be, but Greyhound drivers, or something like that—I only used the work "Longshoremen" because I thought it illustrated what I had in mind; of a man who was dependent upon his daily wage. That is the only reason I used the word "longshoremen," just as an illustration.

Q. But taking men such as longshoremen, you use that to distinguish that class of men that were working for wages?

A. Yes.

Q. All of that group you have purposely left off?

A. I have endeavored to do it, I have aimed to do it.

Q. So far as your intention is concerned, you endeavor, as far as you are able to do it and leave that group off of the jury panel?

A. That is correct.

Q. Do you make any attempt to put the wives of that [fol. 107] class of men of longshoremen on the jury list?

A. We do, because as to the wives I do not pay any attention to what their husbands occupation is, if that is what you mean.

Q. Isn't it a fact that to your knowledge the women that are on this jury panel, that the great proportion of their husbands are business men?

A. I don't know. I have never checked it up.

Q. In other words, you would not be able to say that of your own knowledge, that the biggest percentage of those women are wives of business men?

A. No. I noticed some of them were sales women in stores and that sort of thing.

Q. Is it not a fact that the biggest percentage of the women on this jury panel are either the wives of wealthy men or business men?

A. I do not know.

Mr. Spivock: That is all.

Re-cross-examination.

Mr. Dunne:

Q. As I understand you, you paid no attention whatsoever to whether the prospective jurors were wealthy or poor, in fact you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing?

A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor?

A. That is correct.

[fol. 708] Q. You just pick them as they come?

A. Yes.

Mr. Dunne: That is all.

Further re-direct examination.

Mr. Spivock:

Q. It is common knowledge to you that business men and wives of business men generally represent a higher class of wealth than the working people?

A. I do not think I quite get you.

Q. As a matter of fact, don't you know that business people, as a general rule, are much wealthier as a class than laboring people or working people, don't you know that?

The Court: I think the question should be confined to what he knew and had in mind and considered when he was making up his part of the jury list.

Mr. Spivock:

Q. When you selected mostly business men, as you have stated, Mr. Maling, didn't you have in mind that the business people generally represent more the wealthy class than the laboring people?

A. No, I did not pay any attention to the financial standing of anyone.

Mr. Spivock: That is all.
Mr. Dunne: That is all.
The Court: You may step down.

WILLIAM C. MIKULICH, called for plaintiff; sworn.

Mr. Spivock:

Q. Mr. Mikulich, what is your business or occupation?
A. I am an insurance broker.
Q. In the Mills Building?
A. Yes.

[fol. 109] Q. You are also a jury commissioner of this court?

A. Yes.

Q. How long have you served as such?

A. I think it is somewhere around three or four years now—three years, probably.

Q. You have heard the questions which I have propounded to Mr. Maling?

A. Yes.

Q. And would your answers generally be pretty much the same?

A. As a whole, yes.

Q. Then it is a fact that in selecting jurors for this court you select mostly business men, is that correct?

A. Well, I would say about 50 per cent.

Q. Isn't it a fact that the average runs a little higher than 50 per cent?

A. Well, I don't think so. I have tried to keep away from the business end.

Q. When I say business men, I am not referring merely to the executives, such as presidents, or owners of business; you know there are a great many employees in a big corporation that hold responsible jobs, and we call them business men in that sense, although they are working for a big concern.

A. But a salesman for a brewery would not be considered a business man.

Q. No, I do not think he would be called a businessman, but would you say at least 50 per cent of those men selected are business men?

A. Yes, connected with some business concern, probably.

Q. They are either business men or connected with some big business concern?

A. Yes.

Q. In your selection, do you omit from the jury list wage [fol. 110] earners and laborers?

A. No.

Q. Did I understand you when I was talking to you about it that you did not put in the laboring people?

A. Labor people, yes, as Mr. Maling has explained, a carpenter comes in here who is getting $15 a day, and he is working on a job, and he is complaining about taking him off the job.

Q. You look at his name, and as soon as you see he is a carpenter you omit him, is that correct?

A. Yes, because in the past those men came into court and offered that as an excuse, and the judge usually let them go.

Q. And, of course, the very reason you omit them is because you feel the judge might let him go?

A. Yes, and it is an injustice to the man, I believe.

Q. Will you explain the type of occupation that you exclude purposely, what type of occupations?

A. Well, all the iron craft, bricklayers, carpenters, and machinists.

Q. All of those groups you have excluded from the jury list?

A. Yes, and in this O'Neill case they were objecting we had no Union Labor people on there, and there was a lady on the jury whose husband was a janitor belonging to the janitor's union.

Mr. Spivock: I move to strike that as not responsive.

The Court: The motion is denied.

Mr. Spivock:

Q. Then the types of people that you definitely omit from the jury list are those that you say are of the highest class in the labor world?

A. Yes.

Q. How about a person who is listed as laborer, would you select him as a juror?

A. Yes, if he wanted to serve.

[fol. 111] Q. Have you ever as a matter of fact selected anyone who was listed as a laborer?

A. It is hard to tell you that.

Q. Have you any recollection of one instance where you selected a laborer?

A. No, I have not, but I do know this, when this question came up about a year ago that no labor people were appearing on the list I wrote out to one of the officials and asked them if they had any union labor people available for jury duty, and I never received a reply from them.

Q. Was it necessary for you to ask the consent of a union labor organization whether they would supply you with jurors, or was it your duty?

A. I was trying to be fair and get a percentage of union labor in there, the objection being that we had not put union labor people on the jury.

Q. However, it was known to you, was it not, that you did not have to ask the consent of the union to select them; in other words, it was not for you to decide whether it was fair, and your duty was merely to select a cross section of the people in San Francisco who might be impartial and fair jurors?

A. Yes.

Q. In making your selection you say certain classes of labor were purposely excluded by you?

A. Yes, what I said before, and Mr. Maling has said, if we selected those people and they came into court with valid excuses, the judges let them go, and all you would do is take their time.

Q. With regard to women, have you made any effort for them to have equal representation on the panel?

A. I happened to drop into Judge Roche's court room the [fol. 112] other day, when he was selecting this panel, and it looked about 60 per cent men and 40 per cent women.

Q. Is there any reason on your part why you put on more men than women?

A. It is rather a hardship,—this is purely my opinion, it is rather a hardship on women who have their homes, with the burden of housekeeping, motherhood, and the rest, and they do not want to serve as they did at one time.

Q. So, as a result of that, you have used your own best judgment, and you have purposely put on more men than women, is that correct?

A. Yes.

Q. Have you made any effort to apportion the jurors that you have selected by districts?

A. No.

Q. Have you any facilities to do that?

A. No, we have no facilities, we have a big district that runs from here to San Luis Obispo and up past Marin County.

Q. Do you receive any compensation for your work?

A. Yes, I receive, I think it is, about $100 a year.

Q. In other words, the appointment is really sort of honorary?

A. Honorary.

Q. There are no facilities provided for you to make an investigation of the qualifications of a juror before he is brought into court?

A. No, I have not the power of subpoena, or anything else, I cannot bring them in as the Jury Commissioner of San Francisco can do, and examine them, and take that off the judges' hands.

Q. Have the Federal Judges given you any directions or rules as to how you should go about selecting jurors?

A. No.

[fol. 113] Q. They merely tell you to go and get a jury and leave it entirely to you?

A. Yes.

Q. Do you follow any rules of the State Court or follow the Code sections here?

A. No.

Q. Are you familiar with them?

A. No, I am not. Mr. Maling notifies me about every ninety days that we are going to select another jury panel, and I give him half of it in two or three days.

Q. Do you make any effort to put Negroes or Chinese on the list?

A. No.

Q. Mr. Mikulich, have you had any business with the Southern Pacific Corporation?

A. No.

Mr. Spivock: That is all.

Cross-examination.

Mr. Dunne:

Q. Mr. Mikulich, as I understand it, far from excluding or attempting to purposely exclude labor people or working people, you have actually made an effort to get them on the panel, is that correct?

A. Yes.

Q. That has been a conscientious effort on your part?

A. Yes.

Q. Have you ever purposely excluded any geographical area in the City of San Francisco, or its vicinity?

A. No.

Q. Or purposely excluded any other area within this District, within traveling distance of court?

A. No.

Q. I assume that you do not put in the names of people who live over 100 miles at San Luis Obispo?

A. No. I never have gone down as far as San Jose, although the court allows expenses if they live that far away. [fol. 114] Q. You endeavor to get people who are within traveling distance of the Court?

A. Yes.

Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do?

A. No.

Q. Or because of the amount of pay they receive?

A. No.

Q. Or because of their wealth?

A. No.

Q. Is it correct that your only exclusion in that respect is as Mr. Maling expressed it, that you endeavor not to put into the box the names of those persons, persons of the type that you know from experience the Court will excuse when the time comes for examination of the jurors and swearing in of the panel?

A. That is what we try to do.

Q. But otherwise you make no discrimination whatsoever?

A. No.

Mr. Dunne: I have no further questions.

Redirect examination.

Mr. Spivock:

Q. Mr. Mikulich, the method which you have testified to as using in the selection of the jury was the same method used which resulted in this list of about 100 sworn in the other day before Judge Roche?

A. Yes.

Q. One other question, do you make any attempt to get a cross section of people of San Francisco with regard to wealth in selecting the names of jurors?

A. No.

Q. Might I ask you if it is not a fact that you do select, primarily, those who are of the wealthy group, business men and such?

A. No, that is not true. As I say in our selection, we will come across, we will say, John Brown, Clerk of the Standard [fol. 115] Oil Company, he sounds like an intelligent man, and we put him in the box and the Judge then interrogates him.

Q. But so far as a cross section of San Francisco people in regard to wealth is concerned, you have no knowledge one way or the other on that?

A. No, although the big corporations and people hiring a lot of people are usually down in that section which you call the business district, but most of them live in Berkeley, Fruitvale, or some place like that.

Q. In other words, the main group of names that you select are taken from the busjness district, is that true?

A. About 50 per cent.

Q. At least 50 per cent?

A. Yes.

Q. And, of course, it is common knowledge that the business people are the wealthier class rather than the laboring class?

A. I guess that used to apply.

Mr. Spivock: That is all.

Mr. Dunne: I have no further questions.

(Endorsed:) Filed Aug. 21, 1943.

[fol. 116] The Court: You may be excused. Call your next witness.

(Here follows the testimony of Walter B. Maling and William C. Mikulich.)

The Court: Call your next witness.

Mr. Spivock: I have no further witnesses. I believe it would be merely cumulative to call more attorneys. In other words, we have the two jury commissioners and two attorneys.

The Court: He has finished his evidence and you may proceed.

Mr. Dunne: I should like to call Mr. Calbreath.

CARL W. CALBREATH, called for the defendant; sworn.

Mr. Dunne:

Q. Mr. Calbreath, what is your business?

A. Deputy Clerk in this court.

Q. How long have you been a Deputy Clerk?

A. Since 1912.

Q. Mr. Calbreath, did you act as the court-room clerk for Judge Roche at the time that the present panel of trial jurors was summoned to appear before Judge Roche?

A. I did.

Q. Did Judge Roche on that occasion when the panel was present, those who had responded—did Judge Roche at that time read to them the California statute as to the qualifications of jurors?

A. Yes, he did.

Mr. Spivock: California statute, did you say?

[fol. 117] Mr. Dunne: Yes, as to the qualifications of jurors.

Q. Did he at that time inquire whether or not there were any of those who had been summoned who did not have those qualifications?

A. He did.

Q. Do you recall now whether any responded that they did not have those qualifications?

A. They did.

Q. To those who responded they did not have the qualifications, what did Judge Roche say?

A. He excused them.

Q. So that those people are not on this panel?

A. Correct.

Q. Has that practice that Judge Roche followed, so far as you know been the constant practice of this court?

A. It has been since I have been Judge St. Sure's courtroom clerk.

Q. Now, Mr. Calbreath, in respect of all the names of the persons that were drawn from the box, are you able to say from the proceedings had before Judge Roche whether any of those were persons that could be classed as working people?

A. There were quite a number.

Q. Could you give us an idea of the number that appear on this jury list?

A. I would say as we heard stated in court, there were about 25 percent of this present panel. You understand, we do not inquire of everyone their vocation, I mean on the panel, out of that 100, I should say that he examined maybe 25 or 50.

Q. When you say Judge Roche examined them, you mean he examined them when under oath?

A. When they came up and presented excuses. There were 161 summoned. We now have on the panel of jurors 105. Judge Roche examined the difference between those [fol. 118] figures and excused them.

Q. That would be 56?

A. About 56.

Q. That he examined and excused?

A. Yes. That might have been in court, it might have been by a letter sent to him.

Q. As a result of this examination, about 25 percent could be classed as laboring people?

A. I would say that.

Q. Men who work with their hands?

A. Yes.

Q. Men who work for daily wage?

A. Yes.

Q. What character of people were they?

A. May I refer to some notes here that I have? Here is a lady, a saleslady in O'Connor-Moffitt. She has served

on the jury before, she will serve beginning the first of the year.

Q. Will you tell us why she will serve the beginning of the year?

A. She told the Judge this was the busy time of the store of O'Connor-Moffitt, they were short of clerks, and she was willing to serve after the first of the year, or the Christmas season was over.

Q. So the Judge gave her a temporary excuse?

A. Until January 1. George W. Brown was a leaderman in the shipyard in Sausalito. I understand a leaderman is a foreman. He was excused permanently. Daniel W. Desmond is now on the jury. He gave his profession as a labor negotiator. He asked to be excused. The judge denied it. A man named Carl E. Haglund works for the City Water Department of San Francisco. Charles S. Hobbs, with the White House, asked to be excused because of the rush of business and shortage of help at the White House. Reed Jones was a checker clerk and watchman at the Encinal Terminals in Oakland. He worked nights. [fol. 119] Walter W. Krueger is a time checker in a project at Hunters Point. Clota C. Sayre is an office employee, a stenographer with one of the drayage firms. I did not get the name of the firm. She is serving.

The Court: Serving on the jury panel?

A. Serving on the Jury Panel. Charles A. Wickliffe is with the Bethlehem Steel Company in San Francisco in piecework payment and accounting department. He was excused. Elmer C. Durnin is with the Walworth California Company in charge of orders, traffic and inventory control. He was excused. Charles W. Coey is an accountant with the Albert S. Samuels Company. He was excused. That is a jewelry firm. Earl F. Hughes is manager of one of Lundstrum's hat stores in San Francisco. He was excused. A. Clive Wilshire is a journeyman electrician at the Marin Shipyards in Sausalito. He was excused. Frank M. Stoll was a switchman for the telephone company in San Francisco, and he worked at night, and he was excused.

Mr. Dunne:

Q. Now, in the past, from your experience, acting as court-room clerk for the judges of this Court, when names

were drawn from the box were being examined for qualifications or presenting excuses and were being sworn on the trial panel, has it been your experience that there were upon all of these panels people who could be classed as working people, that work with their hands?

A. In 1940, the July term, when they adopted the master panel of trial jurors and they were impaneled before Judge St. Sure, each time from then on I can say that there were a large number, sometimes 25 percent, sometimes 35 percent. A great many of those, however, were excused. I have a list of a few of them that did serve on the jury.

[fol. 120] Q. Those were names that came out of the box as the examination proceeded, came out of the wheel?

A. Came out of the wheel.

Mr. Dunne: That is all.

Cross-examination.

Mr. Spivock:

Q. Mr. Calbreath, you said that Judge Roche read certain California statutes to the jury the other day. What were those sections?

A. Sections 198, 199 and 200 of the Code of Civil Procedure. And I think he read section 201.

Q. 198, 199, and 200?

A. And I think 201, which has to do with no excuse shall be——

Q. (Interrupting:) 201 has to do with excuses of jurors?

A. Yes.

The Court: May the witness be permitted to look at the statute?

Mr. Spivock: Yes.

A. Section 198 is, "Persons competent to act as jurors." He then asked for anybody that came under this to step forward. Then section 199, "Persons not competent to act as jurors." In that category I think there was one man excused because he was not a citizen. Then 200 is "Exemption from jury service," and 201 is, "Considerations governing excuses of jurors." I think that is as far as he read.

Q. You said that there were approximately 161 jurors that were on the panel present before Judge Roche?

A. There were 161 served by the Marshal.

Q. And out of that group 105 now remain on the panel?

A. I think it is 105 or 106 that remain on the panel for service as trial jurors.

Q. And Judge Roche you said excused about 25?

A. The difference between 105 or 6 and 161 was what he excused.

[fol. 121] Q. Are you positive they examined in open court all of the jurors that were excused?

A. Well, I am not positive of that. I will say that A. Clive Wilshire wrote a letter to the Judge and he was not present in court, and there were some isolated instances like that where they had written a letter to the Judge and he passed on their excuse and handed me the letter and said to excuse them from the panel.

Q. Did I understand you to say Judge Roche examined about 25?

A. He examined more than——

Q. More than that?

A. Yes. They filled the jury box twice, that is, 24 in the morning, and in the afternoon he filled the jury box and examined about 20 in the box.

Q. About 44?

A. Yes.

Q. Out of 44 you said about 25 percent of those represented working people or laboring people?

A. I think that is about right.

Q. In other words, the 25 percent is based on those who were excused only, is that correct?

A. That is right.

Q. However, in this group of 105 remaining who did not ask to be excused, did you make any check on their occupation?

A. No, they were not checked for their occupation.

Q. Isn't it a fact that on that list of 105—have you glanced over them?

A. Yes.

Q. Their residences, where they live?

A. Yes.

Q. Are you familiar with some of these people? Do you know what their occupations are from reputation?

A. Yes.

Q. Isn't it a fact that most of the jurors on this present panel right now are of the wealthy class?

[fol. 122] A. I would not say that. Rebecca Bernstein is on there, she is a saleslady. Mr. Desmond is there; he is a labor negotiator. Clota Sayre is a stenographer, office employee. There is a man named Wisely who works as a salesman for Dun & Bradstreet. I don't know any of the others just now off-hand.

Q. You have testified very well as to those that are of the so-called working class. How about Eva S. Golden?

A. I don't know.

Q. She lives at 1000 Mason street, one of the wealthiest apartment houses in town.

A. I couldn't tell you anything about that.

Q. Are there any others that you know of that are business people or wealthy people?

A. There is a man named Davis; he was in the office this morning talking with me; he works for some firm and he has been called back to Chicago.

Q. Do you happen to know Fred G. Ainslie, 1517 Pine Street?

A. No.

Q. Do you happen to know Berwick B. Futernick, 444 Bryant street?

A. No, I don't know him.

Q. Do you know Garrett M. Goldberg?

A. Yes, he owns a paint store on Mission street.

Q. Quite a wealthy man, isn't he?

A. I couldn't say.

Q. In other words, it is very clear to you, is it not, that at least a majority of them are of the wealthy group?

A. I would not say that.

Q. They are at least of the business class?

A. They are.

Q. There is no doubt there are more than 50 percent of the business class?

A. I don't know enough about them to say.

[fol. 123] Q. You have given quite a bit of testimony on those that are employees.

A. I only know a few of them; later on when they are examined in the jury box and their occupations are given then I will know more about them.

Q. You have been connected with the Federal court for quite a while.

A. Yes.

Q. You have conversed quite a good deal with attorneys?

A. Yes.

Q. Isn't it a fact, without any question of doubt, that the general run of jurors on the jury panels, the majority of them are so-called wealthier business men?

A. I would say about 50 percent.

Q. At least 50 percent?

A. It varies; on some of the jury panels it has been less than 50 percent.

Q. But according to the method you use of acquiring them they average at least 50 percent of the business executives or people of the wealthy class?

A. I would say they may be business men, I would not know whether they were wealthy.

Q. You would say at least they are in the business class?

A. Yes, some kind of business.

Q. In other words, you appreciate some might not be wealthy but they are at least in the business class?

A. That is true.

Mr. Spivock: That is all.

The Court: Step down. Call your next witness.

Mr. Dunne: If your Honor please, I should like to be sworn.

Mr. Spivock: Do you wish the right to argue the matter afterwards?

Mr. Dunne: Yes, I do.

[fol. 124] The Court: Do you object to his having that right reversed?

Mr. Spivock: No, I won't object to that, your Honor.

Arthur B. Dunne, called for the defendant; sworn.

The Witness: My address is 2090 Vallejo street. I am an attorney-at-law, licensed to practice in all of the courts of the State of California, the United States District Court, the United States Circuit Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. I was admitted to practice in the State of California in August, 1923, and since that time I have practiced my profession at my office in San Francisco.

In view of the testimony, if your Honor please, that was given this morning by Mr. Hallinan as to the Kurtz case,

I cannot independently remember these matters, but by reference to my own notes at the time of the impanelment of the jury, I would like to state the composition of the jury in the case of Kurtz v. Southern Pacific Company. I do not have all the full names; in many instances I have only the last name. Mr. Lemons was in the investment security business; my recollection is he was not the proprietor of that business. Mr. Cassidy was a retired manufacturer's agent, and when in business had his own small establishment representing Eastern manufacturers of underwear and hosiery. Mr. Rushforth was an employee of Gantner & Mattern, a manufacturer of textiles here in San Francisco, and which at one time had a retail store; whether they still [fol. 125] have that retail store or not I could not say, your Honor. Mr. Apple was a retired bookkeeper of the United States Post Office. Mr. Williams was an employee of Armour & Company. I have not a clear recollection of that man, to say just what his capacity was. He was not one of the principal managers, I can say that. Mr. Glover was connected with the Equitable Life Insurance.

Mr. Spivock:

Q. You say with the Equitable Life Insurance Company, In what capacity?

A. I hesitate to say. I know he was not one of the heads of the office here. My recollection won't permit me to go beyond that, to say exactly what his connection was. I want to say the same thing of the next man, Mr. Adams, he was connected with the Connecticut Mutual Life Insurance Company. The next man was a Mr. Cunningham, and I have no note as to what his business or work connections were. The next man was a Mr. Malthuse, who was a paint contractor, and my notes would indicate he had his own business. Mr. Wood was secretary of the Mechanics Institute. The Mechanics Institute is an organization in San Francisco that was financed to maintain a library downtown. Mr. McLean was a retired caulker, and Mr. Bolander was a millwright. On the jury in the other case, before I pass to the other case, my notes also indicate.

Mr. Spivock:

Q. You are referring now to what case?

A. The Kurtz case. My recollection is, verified by my notes, that the plaintiff in that case exercised only two peremptory challenges.

[fol. 126] The Court: When was the Kurtz case tried, do you recall, about?

A. My recollection is the Kurtz case was tried about five years ago before Judge St. Sure.

Q. That was against the Southern Pacific Company?

A. The Southern Pacific Company. The second case, or the case referred to by Mr. Hildebrand this morning, Merritt v. Southern Pacific Company, I did not impanel that jury, and the notes that I have are the notes taken by an associate, a young man in my office, who did impanel that jury. He has no notes as to the first juror, a Mr. Bugeia. The next juror, Mr. Sheehan, was a retired member of the San Francisco Fire Department. The next, Mr. Smith, was an architect; the next man, Williams, the note is he was an ex-employee of the Southern Pacific Company who at the time was, and my recollection is, had been employed for some years by the California Redwood Association, that is an association concerning the preservation of redwood trees of California. The next juror was Sherman; I have no notation as to him. The next is Bailey, an engineer. The next was Mr. Tyler, a timekeeper. The next one was Mr. Bruml; it looks like, the notation is a salesman at Capwell's, that is a store in Oakland. The next one was Mr. Manseau, it looks like, I am not sure of this writing, a retired Army man. The next one was Mr. Bucklew, who was then unemployed. The next was Mr. Kern; the only notation is general insurance. The next is Dow, an importer of vegetable oil.

Comment was also made this morning on the merits of the Kurtz case, and if your Honor deems that pertinent I should like to state an outline of that case to your Honor. Some comment was made.

[fol. 127] The Court: By the other counsel, do you mean?

A. Yes.

Q. You may do so.

A. Kurtz, a passenger on the Southern Pacific train from Santa Barbara to come to San Francisco claimed to have purchased a ticket. He was the only witness on his own

behalf, except medical witnesses. He testified that he purchased a ticket in the afternoon of the day he left Santa Barbara at the Southern Pacific ticket office at the depot at Santa Barbara; he boarded the train known as the Sunset, went into a chair car; he had no Pullman ticket. He rode in the chair car until about 50 miles north of Santa Barbara, the train had been moving a little over an hour, when he left to go back into the train to find the Pullman conductor in order to obtain a Pullman ticket; just as he stepped to the door of the car in which he had been riding and onto the vestibule, the train lurched; he claimed that he was thrown to what was then his left, which would be the right side of the train in the direction in which it was moving; that the door there in the vestibule was open, and he fell out and was injured. His testimony was very positive that he fell from the right-hand side of the train. His testimony also was that as a result of the fall he was so injured that if not unconscious, he was almost unconscious and incapable of even walking or crawling. Our evidence developed that he was discovered on the right-of-way some hours later by the crew of a train which was moving south from San Francisco towards Santa Barbara; that he was not found to the right of the track in the direction in which the Sunset had been going, but was on the other side of the track, and that he had not crawled there, and from that we [fol. 128] argued and urged that his testimony that he had fallen from the right-hand side was inherently improbable and was false. The defendant also produced the testimony of the trainmen that no doors or drops on the train had been left open, and we also produced testimony from witnesses and from records that no such ticket as he claimed to have purchased was sold by the Santa Barbara ticket office that day. He testified that he had purchased at the Santa Barbara depot a one-way ticket for transportation from Santa Barbara to San Francisco. Our agent testified that the record showed that no such ticket had been sold at that station that day or the day before, or the day after. That is my recollection of the testimony, it was a series of three days; the day of the accident may have been the third of that series of three days, or it might have been the first, I do not want to be positive that a day was blanketed on each side; but in addition he claimed he boarded the train with an overcoat and with a bag and hat, and my recollection is that at the time he was found he did not have any bag

with him, and he did not have any hat, and my recollection is indistinct as to whether he testified he had his overcoat at the time he was found. Our evidence showed that there was a uniform practice of searching this train when it arrived at terminals to find anything in the train that had been left by the passengers, and keep a record of it, and that such a search had been made and our records disclosed that no articles of the description that he claimed to have boarded the train with were found on the train, or were turned in by anybody. In addition to that, he was carefully examined as to the movements of the train from the time it [fol. 129] arrived at the Santa Barbara station until it left, and he testified that the train came in, stopped, that he boarded the train, and then there were no further train movements until the train, itself, left Santa Barbara and started on its northward journey. We showed by our evidence that it was the practice, not at the time of the accident, but at a later time that the practice had been changed, but at the time of the accident the train was made up of a number of cars, including the diner, and that at the time of the accident it was the practice to switch that diner out of the train at Santa Barbara and not carry it north of Santa Barbara, while at a later time the practice was to keep the diner on the train. We also produced evidence that after this man was out of the hospital he was again seen at Santa Barbara, that he had been seen in the station, and my recollection is that the station agent testified that the man made inquiry at the station as to the routine of purchasing tickets and reserving seats on the train. And we also were able to produce testimony that at a later time after the accident and when this man was out of the hospital, he was found in company with another man at King City, California, which is between Santa Barbara and San Francisco riding northward on a Southern Pacific freight train, riding without transportation; that case was defended and we put it to the jury on the ground that the man was not telling the truth, that he had not purchased any ticket, that he had not gotten on any train, that he had made a subsequent investigation and reconstructed his story, and that he had made the mistake in the practice of the operation of the train and the cutting out of the diner, that he [fol. 130] had not been a passenger on the train, at all, but he was a trespasser on the train, and was on the bag-

gage car, and that he had fallen off from there, not on the right-hand side of the train, but on the left-hand side of the train, between the two tracks.

I recite that to your Honor for the purpose of showing to your Honor that the case was defended and submitted on that *that* ground. The jury found for us and I should have been confident on making the same proof to get the same result before any fair jury. In my opinion, the case was correctly decided by the jury.

In the second case, the Merritt case, that was referred to this morning by the witness——

The Court: Who was that?

A. That was Mr. Hildebrand.

Mr. Spivock: If your Honor please, I suggest that counsel give us just a brief summary.

The Court: I would also think that that request was appropriate. Be as brief as possible, Mr. Dunne.

A. I am sorry I had to be somewhat lengthy about the other case.

The Marritt case was a case where some unknown person at the Ferry Building in San Francisco, in the premises assigned to the Southern Pacific Company, in the waiting room, had dropped a bottle of whisky, which broke, and the floor, which was a tile floor, became wet; the janitor immediately started cleaning up the mess and mopping up, and it was while he was in the process of doing that the woman in the case, the plaintiff in the case, walked through that; it was perfectly open to her observation, and she slipped and fell. It was submitted to the jury upon the [fol. 131] ground of contributory negligence, and the jury returned a verdict for the defendant. I would have been confident of putting that case before any fair jury.

That is all.

Cross-examination.

Mr. Spivock:

—. I would like to ask with reference to the occupation of some of these jurors. I notice quite a number of them are business men, as you stated, but one you stated was an employee of Armour & Company. Would you know

whether he is a manager, or executive, or whether he is just a humble employee of Armour & Company?

A. My recollection of that particular individual was that he was not an executive in the sense that he was the chief or one of the chiefs in charge of Armour & Company's office out here, and it is also my recollection that he was not a laborer; he was not a meat cutter or anything of that sort. I would say that he was an employee of Armour & Company, he had a fairly good job.

Q. I also notice that there were quite a number of insurance brokers and insurance men on the list which you gave.

A. My recollection is not sufficient to go beyond the note that I have, that one was connected with the Equitable Life Insurance Company and the other was connected with the Connecticut Mutual Life Insurance Company. My recollection is that they were not managers of the company, but it does not go beyond that.

Q. But is your recollection to the extent that they were more than mere humble employees, or working in some small positions for the insurance companies?

A. My recollection will not permit me to answer that question. My recollection of those men is that they seemed [fol. 132] to have what I would say was a fair job, although they were not the top men in their organization. I could not give you more detail than that.

Q. Isn't it common knowledge to yourself, as well as to other members of the bar, Mr. Dunne, that the type of jurors in the Federal courts is altogether different from the type of jurors in the State courts?

A. To that question I would say no.

Q. In other words, in your discussions with other attorneys you have not formed that opinion that there is more of the business man and wealthier type of jurors in the Federal court than there is in the State court?

A. If you are asking me for my opinion, there are more men——

Q. There are more of the wealthier class business men on the juries in the Federal court by far than there are in the State courts?

A. I will have to qualify that by putting it this way, it is my experience that with juries in the State courts there are more older people who are retired, and that that makes

perhaps a difference in percentage, but that among those who are younger and are not retired I would say in my opinion the proportion, as far as my observation goes, of men who were employed in insurance companies, banks, investment houses, concerns of that sort, is about the same.

Q. Do I understand that you have talked with any number of attorneys about that, or haven't you had occasion to?

A. I have talked to some, not a great many, I don't think.

Q. I would like to ask you, isn't it the fact or don't you know it is a fact that it is common opinion among attorneys in San Francisco that it is much more difficult for a plaintiff to win a personal injury case in the Federal court than [fol. 133] in the State court on the same facts?

A. I don't know that that is the fact.

Q. Isn't it a fact, Mr. Dunne, that the case of Thiel v. Southern Pacific Company was filed in the State court?

A. Yes.

Q. And you transferred it over into the Federal court?

A. I did.

Q. And it went up to the Supreme Court?

A. You applied to the Supreme Court for certiorari and the Supreme Court denied your application.

Q. And the appeal I took and the efforts I made to have the case transferred to the State court were most vigorously contested by you?

A. I did my very best.

Q. There were lengthly briefs filed?

A. Yes, I think I briefed the case adequately.

Q. Is that the common practice in all cases filed against the Southern Pacific, you immediately move them into the Federal court?

A. You are asking for my personal practice, yes, if the case is removable, we have the right under the Federal statute to remove it into the Federal court, we do so.

Q. Isn't that because of the rule of the Federal court that you must have an unanimous verdict of twelve people, but on the other hand in the State court all you need is nine jurors, which makes it more difficult for the plaintiff to recover? Aren't you influenced to a large degree by that in the Federal court?

A. You say am I influenced by that?

Q. Yes.

A. No, I cannot say that I am, but I would have you qualify that. I have to say this, it has been my opinion, I have always felt that Federal court jurors are very fair [fol. 134] jurors. I have personally always been satisfied with them. You have asked me for the reason of the removal of cases to the Federal court. There is a second reason, I am not sure that it is valid, but lawyers generally seem to think that if you are defending a case it is better to have the requirement of a unanimous verdict. In all my personal experience I have never tried a case in this Federal court where a verdict was returned that it made any difference whether you had a unanimous verdict or a verdict of nine out of twelve. The case in which the jury was divided nine to twelve is the only case I can think of where the numerical difference would result in a hung jury rather than a verdict.

Q. Confining ourselves to personal injury cases, that type of case that we are concerned with here, you are not influenced primarily by the fact that a unanimous verdict is required in the Federal court rather than nine out of twelve in the State court?

A. I would say that was not the sole consideration.

Q. Let me ask you, during the past nine years have you lost a jury case in the Federal court, that is, a final judgment, not an intermediate verdict?

A. I have no recollection of having a final judgment against me in any type of case in the United States District Court for the last nine years. I may be mistaken about that, but if I am I do not recall it.

The Court:

Q. Did you ever settle a case?

A. A great many.

Mr. Spivock:

Q. You have tried in that period of nine years at least twelve jury cases, or more than that, haven't you?

[fol. 135] A. I take it that is correct, that I have tried more than twelve.

Q. The last jury case that you tried was Barton v. Southern Pacific Company, about a year and four months ago?

A. I am not sure that that is the last one.

Q. You have not any recollection?

A. I think there was a case since then.

Q. You have no recollection of any personal injury trial that you tried in the last year in the Federal court?

A. Jury?

Q. Yes.

A. No, I have not in the last year.

Q. You have settled quite a number of cases in that time?

A. Yes, I have settled quite a number.

Q. Didn't the attorneys indicate to you they did not have a chance to win if they try them?

A. Yes, they indicated to me they did not have a chance in the State court.

Q. So that they settled?

A. They said they did not have a good case and we could make a settlement. With lawyers who do not make it a business of rounding up cases against the Southern Pacific we may settle with them, but if you have lawyers that make a business of rounding up business of that sort, or filing cases for the purpose of attempting to get a nuisance sort of settlement we very often go to trial with those cases, even though we could settle them for very much less than going to trial.

Q. There is no insinuation that I go around and do that?

A. As far as I know, Mr. Spivock, I may be mistaken in this, so far as I know this is the first case you have had against the Southern Pacific Company.

[fol. 136] Q. In twenty years in the State court you have tried many cases also, have you not?

A. That is correct.

Q. And you have lost some of those, of course?

A. My recollection now is in San Francisco I have lost none except Federal Employers Liability Act cases, with the exception of one.

Q. The case you had against Mr. Hallinan?

A. That was not a personal injury case.

Q. I was not referring specifically to that, but all cases you have lost in the State court in recent years.

Q. No, in that same period there is this case which is pending on appeal, and with the exception of the Federal Employers Liability Act cases where we do not have the defense of contributory negligence, I can think of only one.

The Court: Step down.

Mr. Dunne: The defendant rests on the matter of this motion.

Mr. Spivock: No further rebuttal.

The Court: Is there any further rebuttal?

Mr. Spivock: No further rebuttal.

The Court: You rest, now, do you?

Mr. Spivock: The plaintiff rests.

The Court: I wish you gentlemen to have an opportunity to argue this. I would like you to do it this afternoon.

[File endorsement omitted.]

[fol. 137] In United States District Court

[Title omitted]

Order Denying Plaintiff's Motion to Strike Entire Jury Panel—November 9, 1942

Plaintiff's motion to strike out or quash the entire jury panel of this Court came on this day to be heard. Allen Spivock, Esq. appeared as attorney for plaintiff and in support of said motion, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for defendant. Mr. Dunne made an objection to the introduction of evidence in support of the motion to strike, which said motion was taken under advisement. Vincent W. Hallinan, Clifton Hildebrand, Walter B. Maling, and William C. Mikulich were sworn and testified on behalf of the plaintiff. Carl W. Calbreath and Arthur B. Dunne were sworn and testified on behalf of the defendant. After argument, [fols. 138-139] the motion was submitted to the Court for consideration and decision, and the same being fully considered, it is Ordered that said motion to strike out or quash the entire jury panel of this Court be and the same is hereby denied.

* * * * * * *

[fol. 140] IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed November 12, 1942

(Adding new paragraph VIIa.)

Now comes said plaintiff and, by leave of Court, files this Amendment to his Complaint herein, thus adding paragraph VIIa thereto as follows:

VIIa

That upon falling from said train, both of plaintiff's feet were cut off at the ankles and plaintiff sustained numerous other wounds about his head and body; that the agents of said defendant Company carried plaintiff back onto said train but negligently and recklessly failed to give him any first aid treatment and negligently and recklessly failed to carry any first aid equipment whatever on said train and negligently and recklessly failed to have on said train any doctor or registered nurse or anyone capable of giving first aid; that about one hour after said accident plaintiff was brought to Truckee, California, by said defendant Company and its doctor there negligently and carelessly failed to give proper medical attention to plaintiff's said wounds but left them in an extremely dirty condition and carelessly left old and dirty dressings thereon until plaintiff was brought back to said Reno some time later; that said negligence caused gas bacillus and other infections to set into said leg wounds, thus causing amputa-
[fols. 141-158] tions of plaintiff's legs which would not have been necessary if he had received proper first aid treatment and/or proper medical care shortly after said accident.

Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

* * * * * * *

[fol. 159] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRE-TRIAL CONFERENCE, SATURDAY, NOVEMBER 21, 1942, 10 A.M.

Counsel Appearing: For Plaintiff, Allen Spivock, Esq.; For Defendant, Arthur B. Dunne, Esq., and Louis L. Phelps, Esq.

Mr. Spivock: At this time plaintiff would make a motion to strike the demand for jury trial upon three grounds: All of the grounds set forth in the previous motion to strike the previous panel entirely; further, that the defendant did not demand a jury trial; and the third ground, that there are a great many complicated issues of law arising in this case which could be more expeditiously tried by the Court than by a jury.

The Court: Didn't the plaintiff demand a jury?

Mr. Spivock: Yes, the plaintiff did demand a jury.

The Court: I will hear what the defendant has to say about it. I always prefer to try cases like this before a jury. I guess if both sides insisted upon it, I might con-[fol. 160] sider it, but, somehow or other, Mr. Spivock, I have always felt that both sides in a personal injury case might be better off to have the fact issues tried by a jury.

Mr. Dunne: So that we may clear the record on that, your Honor, the Federal Rules of Civil Procedure are specific that when a demand for jury trial has been made by one party, the demand cannot be waived or withdrawn except by consent of the other party, and we do not consent.

Mr. Spivock: The rule does not say "must", but merely says "shall." I was reading some authorities this morning on it, and the proper procedure for the plaintiff, if he desires to dispense with a jury, is to make a motion to strike the demand for jury trial.

The Court: Do you agree with counsel that the rule provisions are now brought into operation, and if the other side opposes it, you agree with counsel in substance that the Court has no authority to strike it?

Mr. Spivock: As a general rule. That is the general rule, that if a demand has once been made by the plaintiff, the language says "shall."

The Court: I thought that both counsel might like to know what I personally thought about these matters. I am

a great believer in the jury system. I happen to be one judge who does not want ever to do anything to indicate that it is becoming in disfavor, and as far as I am concerned, I think the jury system is the strongest bulwark in our judicial system.

[fol. 161] Mr. Dunne: Rule 38, subdivision (d), the last sentence, says: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." There is one thing at the outset—oh, I beg your pardon.

The Court: May I look at this?

Mr. Dunne: The last sentence of subdivision (d).

The Court: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Mr. Spivock: There is another rule, 39, if you will look at it.

The Court: "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

[fols. 162-193] I wish it had said "on its own motion," but it did not.

I have more trouble in getting counsel to have a jury trial than I do in getting them to waive it. At home many times I suggest to counsel, when neither have demanded it, that the case ought to be tried by a jury, and it just happens to be one of my strong convictions, one of the strongest that I have about our judicial procedure, namely, that

litigants should have and exercise the right of trial by jury. It is something about the satisfaction that comes to litigants when the case is over, and my experience is, even though they may not be satisfied with the verdict, that they will more willingly acquiesce in the results of the verdict than they will in a decision by the judge. So, in view of the provisions of the rule, and of the lack of consent by the defendant, and also in view of the further belief of the Court that this case should be tried by jury, the motion to withdraw the demand——

Mr. Spivock: The motion to strike out the demand.

The Court: —the motion to strike out the demand is denied.

Mr. Spivock: May the record show there is no intent on the part of the plaintiff to waive any objection he has made to the entire jury panel previously that was stated as part of the motion?

The Court: Let the record show that.

* * * * * * *

[fols. 194-195] In United States District Court

[Title omitted]

Order Denying Motion to Strike etc.—November 21, 1942

This case came on this day for a pre-trial conference and for hearing on defendant's motion to strike amendment to complaint, etc. Allen Spivock, Esq. appeared as attorney for plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for defendant. Mr. Spivock made a motion to strike out plaintiff's demand for a jury trial. After hearing had, it is Ordered that said motion be and the same is hereby denied.

* * * * * * *

[fol. 196] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER IMPANELING JURY AND DENYING PLAINTIFF'S CHALLENGE TO JURY ETC.—November 24, 1942

This case came on this day for trial. Allen Spivock, Esq. appeared as attorney for the plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appeared as attorneys for the defendants. Thereupon the Court Ordered that this case proceed to trial and thereupon the following persons, viz:

Eugene Morgan, Mrs. Catherine Hardiman, James A. Levensaler, Mrs. Phyllis B. Goeppner, Julian H. Hales, Frederick W. Knight, Frank C. Kugelberg, Frederick M. Hohwiesner, William H. Lutz, Herbert N. Bright, D. Richard Martens, Maurice A. Gale, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Spivock entered a challenge to the jury as impaneled herein and made a motion to strike out the jury on the grounds [fols. 197-207] stated, and after hearing had, it was ordered that said challenge and motion be and the same are hereby denied. After hearing the attorneys, it was ordered that the objections to and the motion to strike amendment to complaint be and the same are hereby overruled and denied, and that defendant be allowed an exception to the ruling of the Court. After further hearing the attorneys, it was ordered that the amendment to complaint be deemed to be denied and answered. Mr. Spivock made a statement to the Court and jury on behalf of the plaintiff. Mr. Dunne made a statement to the Court and jury on behalf of the defendant. Gilbert E. Thiel was sworn and testified on behalf of the plaintiff. Mr. Spivock introduced in evidence Plaintiff's Exhibit No. 1. Ordered that the further trial hereof be continued until November 25, 1942, at 9:30 A. M., and the jury, after being duly admonished by the Court, was excused until that time.

[fol. 208] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS DEFENDANT'S MOTION FOR A DIRECTED VERDICT, AND PLAINTIFF'S MOTION FOR A DIRECTED VERDICT—November 27, 1942

The attorneys for the respective parties being present, Mr. Dunne made a motion to dismiss and/or motion for a nonsuit. After hearing had, it is Ordered that said motion be and the same is hereby denied. Thereupon, the parties hereto and the jury impaneled herein being present as heretofore, the further trial hereof was resumed.

* * * * * * *

[fol. 209] Mr. Dunne made a motion for a directed verdict in favor of the defendant, which said motion was ordered denied and an exception noted. Mr. Spivock made a motion for a directed verdict in favor of the plaintiff, which said motion was ordered denied and an exception noted. Ordered that the further trial hereof be continued until November 28, 1942, at 9:00 o'clock A. M., and the jury, after being duly admonished by the Court, was excused until that time. Further Ordered that the attorneys appear at 8:30 o'clock A. M. on said day for hearing on the objections to the proposed instructions to the jury.

[fol. 210] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed November 28, 1942

We, the Jury, find in favor of the defendant.

F. M. Hohweisner, Foreman.

[File endorsement omitted.]

[fol. 211] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 21780-W

GILBERT E. THIEL, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant

JUDGMENT ON VERDICT—Filed November 28, 1942

This cause having come on regularly for trial on the 24th day of November, 1942, being a day in the November 1942 term of said Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Allen Spivock, Esq. appearing as attorney for Plaintiff, and Arthur B. Dunne, Esq. and Louis L. Phelps, Esq. appearing as attorneys for the defendant, and the trial having been proceeded with on the 25th, 27th, and 28th days of November in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the Jury, find in favor of the Defendant. Fred M. Holwiesner, Foreman," and the Court having [fol. 212] ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action, and that defendant go hereof without day, and that said defendant do have and recover of and from plaintiff its costs herein expended taxed at $——.

Judgment entered this 28th day of November, 1942.

Walter B. Maling, Clerk.

[File endorsement omitted.]

[fols. 213-217] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND JUDGMENT FOR DEFENDANT AND TO HAVE JUDGMENT ENTERED FOR PLAINTIFF IN ACCORDANCE WITH HIS MOTION FOR A DIRECTED VERDICT, OR TO GRANT PLAINTIFF A NEW TRIAL HEREIN. (Rules 50(b) and 59.)—Filed December 7, 1942

Plaintiff respectfully moves this Court to set aside the verdict and judgment for defendant entered herein on November 28, 1942 and to have judgment entered for plaintiff in accordance with his motion for a directed verdict made herein at the conclusion of all of the evidence on November 27, 1942, or in the alternative to grant plaintiff a new trial, as provided in Rules 50(b) and 59 of the Federal Rules of Civil Procedure.

Motion to Set Aside Verdict and Enter Judgment for Plaintiff

Said motion to set aside said verdict and judgment and to have judgment entered for plaintiff in accordance with his said motion for a directed verdict is made upon the ground that the great preponderance of the evidence and defendant's *admissions alone* clearly show that plaintiff is entitled to prevail here on all of the three main issues presented at the pre-trial conference.

[fol. 218] MOTION FOR NEW TRIAL

Said motion for a new trial is made as to *each* of said three main issues and is made upon the following grounds:

1. Insufficiency of the evidence to justify the verdict for defendant. The above admissions alone show that there is no substantial evidence to sustain the verdict which is so manifestly and palpably against the uncontradicted evidence and contrary to the law applicable here.

2. Irregularities in the selection of the jury preventing plaintiff from having a fair trial by jury herein.

(a) Plaintiff's motion to strike out the entire panel. It should have been granted because the method of selection purposely excludes the great mass of citizens and purposely selects only those who *by reason of business position*

or social relations would *probably be friendly* to such a gigantic railroad corporation as the defendant. Large groups of working class people are purposely excluded and the very few who are selected cannot hope to overcome the influence of the great majority of jurors who are biased in favor of the defendant.

(b) Plaintiff's motion to strike out his demand for a trial by jury. It should have been granted, especially under the peculiar circumstances here, upon plaintiff's showing that he could not even hope to prevail in a trial by jury when the selection is made in such a highly *discriminatory* fashion.

(c) Plaintiff's motion to strike out the 12 jurors in the box at the trial. It should have been granted because it was [fol. 219] then clearly demonstrated beyond the question of a doubt that plaintiff's repeated charges and fears were *well founded* and it was then obvious that at least 8 of said jurors in the box had strong business ties or personal friendships with officials and agents of defendant Southern Pacific Company; that in particular, one juror admitted a personal friendship with Angus McDonald, recent president of defendant, and another admitted a personal friendship with F. S. McGinnis, vice-president of defendant, and another who later became the jury foreman admitted he played golf with and was friendly with officials of defendant; that of the 23 jurors examined herein, the shocking number of 17 of them admitted business or personal connections with defendant; that the court itself excused 6 because of large business connections with defendant or being a fraternity brother of defendant's counsel; that plaintiff peremptorily challenged 3 jurors because of admitted business connections with defendant, and if the law allowed further peremptory challenges, plaintiff would have been compelled to use so many that the panel would very probably have been exhausted; that defendant used but 2 peremptory challenges, one against an alleged friend of plaintiff's counsel, and the other against a juror apparently because she was a woman; that it became obvious that defendant had demanded the jury trial herein altho it is most unusual for a defendant to do so where a plaintiff is so seriously crip- [fol. 220] pled, because it was extremely confident that any

jury selected from said panel would contain enough of its friends who would prevent a verdict for plaintiff; that defendant well knew that no final judgment on a jury verdict in a personal injury action has been entered against it for the past nine years because the method of selection assures defendant of sufficient jurors who are friendly to it and who by reason of their business and social viewpoint do not favor the giving of damages in personal injury actions brought by poor persons; that in spite of said jurors' statements that they would be impartial, it is a well known trait of human nature that they would consciously or unconsciously tend to favor the Southern Pacific Company because of their social and continuous business relations with it as against the plaintiff who is utterly unknown to them and whose future is of no particular concern to them; that with full knowledge of all of the above and altho plaintiff had demanded and desired a trial by jury, plaintiff was compelled to and endeavored to dispense with a jury trial herein but was prevented by defendant who desired a jury trial.

3. Bias and prejudice of jury. Its rapid verdict in about ten minutes shows that the jury could not possibly have reasonably discussed and considered all of the three main issues in what was admittedly an important case. It shows that the jury prejudged the case by reason of their friendship and bias for defendant and their anti-damage claim [fol. 221] viewpoint to such an extent that they completely disregarded the uncontradicted evidence favorable to plaintiff on all or any of said three issues. The verdict is a gross miscarriage of justice and should not be permitted to stand.

* * * * * * *

[fols. 222-306] Said motions for directed verdict and for new trial are based upon all the pleadings, papers and records herein, upon all the testimony taken upon any motions, depositions and proceedings and the trial herein, upon all rulings of the Court and exceptions thereto and upon such oral and documentary evidence as plaintiff may offer at the hearing of said motions.

Wherefore, plaintiff prays that said verdict and judgment for defendant be set aside and that judgment be entered for plaintiff in accordance with his motion for directed verdict,

or in the alternative that plaintiff be granted a new trial on all or any of said three main issues.

Dated: December 7, 1942.

Allen Spivock, Attorney for Plaintiff.

Admission of Service.

[File endorsement omitted.]

[fol. 307] IN UNITED STATES DISTRICT COURT

ORAL DECISION OF COURT ON MOTIONS

Be it remembered that the above entitled and numbered cause came on regularly for hearing on plaintiff's Motion to Set Aside Verdict and Judgment for defendant, and to have Judgment entered for plaintiff, in accordance with his Motion for Directed Verdict, or to grant for plaintiff a new trial herein, before the Honorable John C. Bowen, one of the Judges of the United States District Court for the Western District of Washington, Northern Division, and the Judge who tried the above entitled and numbered cause in the above entitled court, sitting in Department No. 1 of the United States District Court for the Western District of Washington, Northern Division, at the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 10:45 o'clock A. M., March 20, 1943; plaintiff appearing by his attorney, Mr. Allen Spivock, and the defendant appearing by its attorneys Mr. Arthur B. Dunne, and Mr. Phelps; the court having heard oral argument by Mr. Spivock and by Mr. Dunne, and both sides having completed their said oral argument, at about the hour of 4:30 o'clock p. m., of said day, the Court rendered the following Oral Decision on said motion or motions, as follows, to-wit:

The Court: This case has presented a number of interesting points and a number of them are properly raised and considered in connection with the plaintiff's motion to set [fol. 308] aside the verdict and judgment for the defendant, and to have judgment entered for plaintiff in accordance with his motion for directed verdict, or to grant to plaintiff a new trial herein.

That motion, or motions, and each and all the parts thereof, the court understands have been fully argued and fully presented to the court here at this session today, and the court understands you now, both sides, have submitted that motion, or those motions, and each and all parts thereof, for the court's final determination at this time.

One point that has been mentioned a number of times during the progress of the proceedings, and in various briefs and papers filed by the parties, is that question which the plaintiff has raised concerning the legality of the jury panel and the legality of the jury sworn to try this case.

I have followed that question and have considered it on every occasion when it has been raised, with the same degree of thoroughness each time as if it had not been raised more than once during the progress of this case. It has commanded my attention all along, as I think it would that of any trial judge seeking to do his duty.

We are all solicitous for the application of all safeguards that will make for the just and impartial administration of the procedure of the courts at all times, and when any such question is raised naturally it is of interest, along with all the other questions presented in this case.

On the occasions previous to this, when that question was [fol. 309] raised, I made the rulings which I thought upon the consideration and information which the court then possessed should have been made upon the facts and the law and the justice of the situation.

Here again today I have carefully considered that question, among others, all over, anew and again. I have taken this opportunity at this hearing of reviewing the types of occupations of the jurors who were sworn to try this case, and I find that Juror No. 1, Mr. Eugene Moran, was a shipyard worker at the time he was called away from his work to serve on this case, and had been formerly a railway postal employee.

I find that Juror No. 2, Mrs. Catherine Hardiman, was the widow of a former clerk of the Associated Oil Company, and that Mrs. Hardiman herself, the juror, had never done any work or pursued any occupation other than that of homekeeper—that was the way she expressed it, I believe.

I find that Juror No. 6, Mr. Frederick W. Knight, was a salesman for a stationery business. I don't recall whether the proof went into a great deal of detail whether it was

office stationery—I don't know what other kind of stationery it could have been—but that was the impression I got at the time, that it was what we usually refer to as the stationery business, where office supplies and typewriting paper and carbon paper and things of that sort are sold, among other things. I believe he did some selling on the outside from what I recall of what he said. Selling and [fol. 310] soliciting sales is what I meant by the term "selling outside".

I find that Juror No. 9, William H. Lutz, was a retired steel erection man—that is, a working man when he worked.

I find that Juror No. 10, Mr. Herbert N. Bright, was a retired railway postal clerk; at the time of the trial employed as a custodian or janitor. I don't believe he used the word "janitor", but the way he spoke of his duties and in interpreting what he said in the light of what I have known of persons similarly employed, I think it is another word for janitor service. Anyway, he said he was now employed as a custodian of a Masonic Temple—he may have said "The Masonic Temple", meaning the one in San Francisco, if there is one leading and outstanding Masonic Temple there.

Now I call attention to those respective occupations of the five jurors above named as having a decided bearing upon the plaintiff's contention that, among this jury panel, and particularly this jury that was sworn to try this case, the plaintiff was prejudiced by reason of the fact that there was a noticeable absence of jurors of the working man or employee class, or wage earner class, as counsel in some connections stated it. And I believe it is appropriate to note that these five jurors whose names and occupations I have just mentioned, belong more closely and intimately with the working man and employee class than they do with any other class, and as to whether the twelve jurors were fairly representatives of the prevalent occupations we find these five jurors when compared with the others do not [fol. 311] belong to the same occupational class as the remaining seven jurors. Some of the remaining seven were business men, and I think one or two of them might be termed important business men, having important or leading or outstanding business connections.

I think that might be said of Mr. Maurice A. Gale, who was Juror No. 12, and also it might be said of Mr. Frank

Kugelberg, Juror No. 7, and also Juror No. 8, Mr. Hohwiesner, who I believe was the foreman of the jury.

As to others of the seven jurors it is not certain they were men of important business affairs. It is true Mr. Levensaler, Juror No. 3, was in the insurance business, but I personally did not get the impression he was in a managerial class.

Mr. Spivock: He was an insurance broker.

The Court: We do have Mr. Kugelberg, Mr. Hohwiesner and Mr. Gale who are admittedly important business men.

We have Richard Martens, Juror No. 11, who is a retired commission merchant. I don't know, and I don't believe the evidence discloses, what importance his financial standing or former business may be or may have been. Of course, one who is retired may be upon that status for many different reasons. It may be business failure or business success which made it possible for him to quit work, or it might be due to some change in his physical life or health. I don't know.

And we have another man, Juror No. 5, Julian H. Hales, who called himself a rice broker and accountant. And [fol. 312] again, we cannot tell without specific information as to the relative importance of his business compared with that of the so-called managerial or employer class of business. I had not previously regarded the usual run of accountants as being included in the managerial class. I regard them more as belonging to an independent calling like that of some professional man, such as a doctor or dentist or lawyer or any one in any professional independent calling.

So that upon those facts which I have observed in connection with the twelve jurors, or most of the twelve jurors who were sworn to try the case and who did try it, we find five of them who I think it may be fairly supposed would be expected to be sympathetic with the experiences in life, the affairs of life, and with the economic views, of people who belong to the working or employee class. I think that might be expected of those five of the twelve jurors.

It seems to me that that disposes of any just contention that these twelve jurors who decided this case were biased, or likely to be,—it being the effect of the contention of plaintiff's counsel that it is an inescapable conclusion

that the jurors were biased against plaintiff and in favor of defendant.

It seems to me these observations just made by me show such conclusion contended for by plaintiff's counsel is not only escapable but it is shown to be not true at least as to five of the jurors, and there is no showing of fact to support such conclusion as to the other jurors.

[fols. 313-320] There are many other points involved in this case. I think, however, it is not necessary, and I doubt if counsel wish the court to take the time, to discuss all of them. As to such remaining points it seems to me fair to observe that all other material questions of fact now presented on these motions were submitted to the jury. There was before the jury credible evidence amply sufficient to sustain the jury's verdict.

At this stage we must conclude from the verdict that the jury did believe that evidence, no matter whether there was opposing evidence or not.

All the vital questions of law now presented in support of these motions have been previously raised, considered and determined, and with such determination the court, after full discussion and further full consideration, is now satisfied.

The plaintiff's motion to set aside the verdict and judgment for the defendant, and to have judgment entered for plaintiff in accordance with his motion for directed verdict, or to grant plaintiff a new trial herein, and each and every part thereof will therefore be denied.

* * * * * * *

(Form of Order handed by bailiff to each of counsel).

[fol. 321] IN UNITED STATES DISTRICT COURT

ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE VERDICT AND JUDGMENT—Filed March 20, 1943

Plaintiff's Motion to Set Aside Verdict and Judgment for Defendant and to have Judgment Entered for Plaintiff in Accordance with his Motion for a Directed Verdict, or to Grant Plaintiff a New Trial Herein, having come on this day regularly for hearing in open court at Seattle, the plaintiff being represented by his attorney of record, Mr.

Allen Spivock, of San Francisco, California, and the defendant being represented by its attorneys, Mr. Arthur B. Dunne and Mr. L. L. Phelps, both of San Francisco, California; and oral argument having been made upon said motions by such attorneys for each side; and said motions having been submitted for decision; and it appearing that all material questions of fact now presented in connection therewith were submitted to the jury; that there was before the jury credible evidence amply sufficient to sustain the jury's verdict; that the vital questions of law now presented in support of these motions have been previously raised, considered and determined; and that with such determination the court after full discussion by counsel and further full consideration is now satisfied; and the court being fully advised in the premises; now therefore it is hereby

Ordered that said motion or motions, and each and every part thereof, be, and they are hereby denied, to all of which rulings plaintiff excepts and his exception is allowed.

Done in open court at Seattle this 20th day of March, 1943.

(Sgd.) John C. Bowen, United States District Judge.

[fol. 322] [File endorsement omitted.]

[fol. 323] In United States District Court

[Title omitted]

Order Denying Plaintiff's Motion to Set Aside Verdict and Motion for a New Trial—March 25, 1943

In accordance with a signed order this day received from Hon. John C. Bowen, United States District Judge, sitting at Seattle, Washington, the Judge who tried this case, it is Ordered that plaintiff's "Motion to Set Aside Verdict and Judgment For Defendant and to Have Judgment Entered For Plaintiff in Accordance With His Motion For a Directed Verdict or to Grant Plaintiff a New Trial" be and the same is hereby denied.

[fols. 324-337] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed June 18, 1943

Notice is hereby given that said plaintiff, Gilbert E. Thiel, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on November 28, 1942 and from the whole thereof, and from the order entered herein on March 25, 1943 denying his motion to set aside the verdict and judgment for defendant and to have judgment entered for plaintiff in accordance with his motion for a directed verdict or to grant plaintiff a new trial herein and from the whole thereof.

Dated: June 18, 1943.

(Sgd.) Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 338] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL—Filed August 19, 1943

Comes now plaintiff who hereby states that he intends to rely upon the following points on the appeal filed herein on June 18, 1943:

* * * * * * * *

II. Irregularities in selection of jury preventing fair trial to plaintiff.

[fol. 339] A. Plaintiff's motion to strike out the entire panel was erroneously denied as the evidence plainly showed that the method of selection is wholly arbitrary and distinctly favors one class or group and was so intended.

B. Plaintiff's motion to strike out his demand for a jury trial was erroneously denied because plaintiff could not hope to get a fair trial by a jury drawn from said panel.

C. Plaintiff's motion to strike out the 12 jurors in the box at the trial was erroneously denied because plaintiff had exhausted his challenges and it then appeared that numerous

jurors were admittedly close friends of defendant and plaintiff could not get a fair trial from such a jury.

• • • • • • • •

[fols. 340-342] Dated August 18, 1943.
(Sgd.) Allen Spivock, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 343-442] In United States District Court

Order Granting Plaintiff Leave to Prosecute Appeal in Forma Pauperis

Ordered:

Plaintiff's application of August 17, 1943, under 28 U. S. C. A. § 832, to prosecute an appeal of the above entitled cause to the Circuit Court of Appeals, without being required to prepay fees or costs or give security therefor is Granted.

Dated: August 20, 1943.

A. F. St. Sure, United States District Judge.

(Endorsed) Filed Aug. 20, 1943.

• • • • • • • •

[fol. 443] In United States District Court

[Title omitted]

Transcript of Hearing—Examination of Jurors

Tuesday, November 24, 1942.

Counsel Appearing:

For Plaintiff: Allen Spivock, Esq.

For Defendant: Messrs. Dunne & Dunne, by Arthur B. Dunne, Esq., and Louis L. Phelps, Esq.

The Court: Are the parties and counsel ready to proceed in the trial of Gilbert E. Thiel v. Southern Pacific Company?

Mr. Spivock: Plaintiff is ready.

The Court: And defendant is ready?

Mr. Dunne: Yes, your Honor.

The Court: The Clerk will call twelve jurors into the box.

The Clerk: Eugene Morgan, Mrs. Catherine Hardiman, Berwick B. Futernick, Mrs. Phyllis B. Goeppner, Frank O. Freese, Frederick W. Knight, William Kahn, Frederick M. Hohweisner, Percy W. Freise, Herbert N. Bright, Richard D. Martens, Maurice A. Gale.

(Thereupon the prospective jurors were sworn to answer questions as to their qualifications.)

[fol. 444] The Court: The plaintiff may at this time make a very brief statement of the nature of the case, so as to advise the jurors what the case is about, and thereby enable them to advise the court concerning the qualifications to sit as jurors in the case.

(Thereupon Mr. Spivock made an opening statement.)

The Court: Mr. Spivock, you may now, as attorney for the plaintiff, as such questions as you think apply to all of the jurors and then finally you may inquire of Juror No. 1, and then when you finish doing that I will give the defendant's attorney the right to inquire of the juror for cause.

Mr. Spivock: I might ask all of the jurors generally, is there any one of you employed, directly or indirectly, by the defendant Southern Pacific Company? If any of you are, will you please raise your hand so I can ascertain that? Have any of you any close relatives connected with the Southern Pacific Company, any relatives that are working or connected with the Southern Pacific Company? Do any of you have any business relations with the Southern Pacific Company, other than as passengers?

Mr. Percy Freise: I have business with them.

Mr. Spivock: I would like to ask all of the jurors, do any of you own any stock in the Southern Pacific Company? Do any of you own any stock in the Pacific Greyhound Company?

Mr. Maurice A. Gale: I do.

Mr. Spivock: You have stock in that company?

Mr. Gale: In the Greyhound.

Mr. Spivock: Are there any other jurors that own any stock in any corporation which is in any way connected or affiliated in any way with the Southern Pacific Company?

[fol. 445] Do any of you own stock in any railroad company, at all?

Mr. Dunne: That is immaterial.

The Court: The objection is overruled.

Mr. Spivock: If I understand it correctly, outside of this gentleman, Mr. Gale, there are none of the jurors that own any stock in the Southern Pacific Company or any of its subsidiaries, or any corporations directly or indirectly controlled by it, or as far as any other railroad corporation is concerned you do not own any stock in a railroad corporation?

Mr. Spivock: I think that completes the general questions.

The Court: You may inquire of Juror No. 1 any special questions that you think may be directed to him as an individual juror, and after you have done that I will give the defendant an opportunity.

A Juror: My firm does business with the company, that is, the firm for whom I work.

The Court: Are you Mr. Knight?

Mr. Knight: Yes.

The Court: What is the nature of that business, do you know?

Mr. Knight: I have nothing to do with it, never handled it at all.

The Court: Would that in any way embarrass you in the performance of your duties as a juror in this case?

A. No, not in the slightest.

The Court: You may now inquire of the jurors in the order in which they come in the box. As I have it, Mr. Morgan was first, and Mrs. Hardiman was the second juror called in the box.

Mr. Spivock: I will start with the gentlemen sitting in the back row, the first one. What is your name, please?

The Juror: Eugene Morgan.

[fol. 446] Mr. Spivock: What is your business?

Juror Morgan: I was at one time in the railroad service, retired, but at the present time working in Richmond Shipyard No. 1.

The Court: You are working in a shipyard?

Juror Morgan: Yes.

Mr. Spivock: I would like to ask you, Mr. Morgan, if the plaintiff shows in this case that he was suffering from

delirium tremens when he was accepted as a passenger by the defendant, Southern Pacific Company, with full knowledge of the conditions, and that no precautions were taken by the defendant company to protect it from harm, and the Court instructs you that this constitutes negligence by the defendant and calls for a verdict for the plaintiff, would you have any hesitancy in bringing in a verdict for the plaintiff?

Mr. Dunne: I object to that.

The Court: The objection is sustained. You cannot ask a prospective juror whether he will bring in a verdict under certain conditions. All you can do properly is ask whether he would consider that instruction along with the other instructions if the Court should give such an instruction.

Mr. Spivock: If instructions are given to you by the Court that certain acts would constitute negligence, and you are satisfied that the evidence shows that those certain acts have been committed by the defendant company, would you have any hesitancy in following the Court's instruction and bringing in a verdict for the plaintiff?

Juror Morgan: No.

Mr. Spivock: If it should be shown here that the plaintiff had the mental illness at the time when he was accepted as a passenger and that was known to the railroad company, [fol. 447] if it should be shown that that mental illness resulted from drinking previously, would the fact that the plaintiff became mentally ill through drinking alcoholic liquors in any way prejudice you against the plaintiff?

Mr. Dunne: I object to that question, your Honor.

The Court: That objection is overruled.

Juror Morgan: I would have to weigh the evidence.

The Court: If it should turn out and be made to appear in the evidence that plaintiff had been a drinking man at one time and that may have contributed in a certain way to his mental condition, would that prejudice you against the case and render you unfit to be a fair and impartial juror?

Juror Morgan: No.

The Court: If the evidence should disclose the plaintiff had been a drinking man at some time it might have some effect?

Juror Morgan: Yes.

The Court: You think if you were in the plaintiff's place suing the defendant instead of the plaintiff, and there was

in the jury box—whose attitude was like your attitude now is, you would not get a fair trial from that juror?

Juror Morgan: It is rather hard to decide. It might have some bearing.

Mr. Spivock: I challenge the juror for cause.

Mr. Dunne: I should like, if I may, to ask the juror a question.

The Court: You may.

Mr. Dunne: Mr. Morgan, do you mean any more than if it should appear that this man's injuries were the result of his own voluntary acts, in the excessive use of alcohol, that that would have some bearing on your consideration [fol. 448] of the whole case: is that all you mean?

Juror Morgan: Yes, it would.

The Court: Have you any way of stating in your own words what your attitude is, without a question?

Juror Morgan: If the man was incapacitated through the use of liquor it might.

The Court: That is not the point. The question is whether or not you have any prejudice against him because of the fact that he may at some time have used liquor to excess and might have adversely affected his health, it would not prejudice you?

Juror Morgan: No prejudice whatever.

The Court: You are absolutely certain you would not be prejudiced against him?

Juror Morgan: No, I would not.

The Court: I think, in view of the last answer, that the Court should overrule the challenge and deny the challenge.

Mr. Spivock: May I ask one more question?

The Court: You may inquire further.

Mr. Spivock: Mr. Morgan, this is what I am trying to point out, at the time the plaintiff was accepted as a passenger the plaintiff claims he was mentally ill, in an abnormal state of mind, which was known to the railroad company at the time they sold the ticket to him, and the question I asked you was if the mere fact that the plaintiff had been drinking excessively alcoholic liquor a few days before, which caused him to get into this abnormal state of mind, would there be any prejudice in your mind because of that?

Juror Morgan: No, there would be no prejudice.

Mr. Spivock: Then, to get it clear, as far as you are concerned, if the plaintiff was out of his mind at the time

[fol. 449] he was accepted by the railroad company, regardless of how it came about, you would still believe that the railroad company, knowing the man was out of his own mind, should have exercised some care under the circumstances?

Mr. Dunne: That is an incorrect statement of the law.

The Court: The objection is sustained.

Mr. Spivock: If I may reframe the question, what I am trying to make clear, Mr. Morgan, is, the fact that he had been drinking previously, a few days before, that caused him, at the time he bought his ticket, to be in an abnormal state of mind, having delirium tremens, the mere fact that the condition he was in was caused by drinking, would that prejudice you against the plaintiff?

Juror Morgan: No.

The Court: I want to say to all of the jurors what counsel is inquiring about is, he is not asking you what your decision is going to be on a supposed state of facts, but it is a question of what your attitude is toward the case, and whether or not by reason of the circumstances related in the questions you would have any prejudice in the case, whether you are biased or unfair, in favor of or against either of the parties to commence with. That is the point of his inquiries.

Mr. Spivock: I have finished with Juror No. 1, Juror No. 1 is passed for cause.

The Court: The defendant may proceed and ask general questions of all of the jurors, and then you can specifically make inquiry of Juror No. 1.

Mr. Dunne: Yes, your Honor.

Are any of you acquainted with Mr. Thiel, the plaintiff in this case?

[fol. 450] Mr. Dunne: I think that will be all the general questions at this time. Mr. Morgan, if his Honor should instruct you that the effect of voluntary intoxication does not excuse a man for conduct, voluntary conduct on his own part, that brought about injury to him, would you have any difficulty in following that instruction?

Mr. Morgan: No.

Q. Have any members of your immediate family ever suffered injury in a railroad accident?

A. No.

Q. Have you ever, yourself, had any difficulty with the Southern Pacific Company?

A. No, I was sent out on railroad service and I served my time.

Q. That is, United States Railway Mail Service?

A. Yes.

Q. What I want to know is whether or not you can be fair and impartial to both sides. Do you feel that you can be that kind of juror?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire for the plaintiff of No. 2.

Mr. Spivock: What is your name?

Juror Hardiman: Mrs. Catherine Hardiman.

Q. What is your business?

A. Housewife.

Q. You have heard the nature of the questions that I have asked the other juror, with reference to whether you have any prejudice against a man who became mentally ill or abnormally ill before he is accepted as a passenger? Would there be any prejudice in your mind because that man's illness resulted from intoxicating drink of alcoholic liquors?

A. No, I would not be prejudiced.

Q. If the Court should instruct you that if a man is mentally ill and accepted by the railroad with full knowledge that he is mentally ill, would the mere fact that his illness [fol. 451] may have resulted from his excessive drinking of alcoholic liquor, would you follow the Court's instruction on that?

A. Yes, I would.

Q. Is there any reason that you know of why you could not give a fair trial to the plaintiff in this case, as well as to the defendant?

A. No, there is no reason.

Q. If it happened that it was a case brought by yourself against the defendant Southern Pacific Company would you be satisfied to have your own case tried by twelve jurors in your present state of mind?

A. Yes.

Q. You are a widow. What was your husband's occupation in his lifetime, what kind of work did he do?

A. He was a clerk.

Q. How long has he been deceased?

A. Going on five years.

Q. Have you had any occupation since that time other than the occupation of housewife?

A. No.

Q. I might ask one more question. Are there any of the officials of the Southern Pacific Company that you are acquainted with, at all?

A. Not a one.

Mr. Spivock: Pass the juror.

The Court: You pass this juror?

Mr. Spivock: Yes.

The Court: The plaintiff passes this juror for cause. The defendant may inquire.

Mr. Dunne:

Q. Mrs. Hardiman, have any of the members of your immediate family ever been injured in a railroad accident?

A. No.

Q. Have you, yourself, had any difficulty with the Southern Pacific Company?

A. No.

Q. It will appear in this case that the plaintiff has been rather severely injured. It is not my business to indicate to you what instructions his Honor will give the jury; those [fol. 452] matters are entirely in his Honor's hands, but I think I can anticipate that his Honor will instruct you that your verdict in this case must be based on the evidence and on the instructions, and considerations of sympathy are to be excluded. Anybody would be inhuman not to have some sympathy for an injured man. In your consideration of this case, however, and in deciding the question of liability in this case, do you think you could decide it by putting aside any consideration of sympathy or charity?

A. Yes.

Q. You think you could decide it solely upon the evidence and upon the Court's instructions?

A. Yes.

Q. Does any reason occur to you why you could not be perfectly fair to both sides in this case?

A. No.

Q. If you were in my position, would you be satisfied to submit your case to twelve jurors in your present frame of mind?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire of the next juror.

Mr. Spivock: Mr. Futernick, we have had acquaintance for several years in a fraternal organization?

A. Yes.

Q. Do you feel that your acquaintance with me would influence your judgment one way or the other in deciding this case?

A. No.

Q. What is your business?

A. Bookbinder.

Q. If the court should instruct you that a railroad owes a special duty of care and protection when it knowingly accepts a passenger who is mentally ill, would you follow the instructions of the Court?

A. Will you repeat that question?

Q. If the Court instructs you that the railroad has a special duty of care to a mentally ill person, even an intoxicated person, knowing it when he is accepted as a passenger, would you follow the instructions of the Court?

A. Yes.

[fol. 453] Q. If the Court instructed you that a railroad owes special care and protection to a passenger whom it accepts knowing that he is mentally ill or out of mind, if the Court so instructs you, would that instruction be followed by you?

A. Yes.

Q. Is there any reason why you know of why you could not give either side a fair and impartial trial in this matter?

A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne: In this case, do you think that you could be a fair and impartial juror to both sides?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mrs. Goeppner, what is your business?

A. Housewife.

Q. What is your husband's business?

A. Florist.

The Court: Where does he have his place of business?

A. He is a partner in Podesta & Baldocchi, 224 Grant Avenue.

Mr Spivock:

Q. Does your husband's firm have any business with the Southern Pacific Company?

A. I believe that he has.

Q. Are you acquainted with any of the officials of the Southern Pacific Company?

A. I am not.

Q. Do you know whether your husband is acquainted with any of them?

A. I don't know.

Mr. Dunne: I think, if your Honor please, in view of the line of questions that counsel is putting, it is fair to say that I have a charge account at Podesta & Baldocchi's.

Mr. Spivock:

Q. Mrs. Goeppner, is there any reason that you know of, keeping in mind the fact of what *you* have just told you, why, after hearing the evidence here, that you cannot give a fair trial to the defendant, or to the plaintiff in this matter?

A. There is not.

[fol. 454] Q. Do you feel in your own mind that there would be nothing influencing you one way or the other outside of the actual evidence in this case?

A. That is all.

Q. So as to make your position in this case clear, your verdict would be based entirely upon the evidence and the Court's instructions, and not outside matters or business relations?

A. That is right.

Q. If the Court should instruct you that when a man who is mentally ill appears at a station for the purchase of a ticket and the ticket seller is told that the man has been acting crazy and is afraid someone is trying to kill him, and the Court instructed you that under those circumstances it is the duty of the railroad to make inquiry as to

whether he could be carried safely, would you follow that instruction?

A. I would.

Q. Would you have any prejudice against the plaintiff because of his mental illness at the time he was accepted as a passenger resulting from excessive drinking of liquor a few days previous from his disappointment from a recent marriage?

A. No.

Q. I would like to ask you finally, do you feel absolutely sure in your own mind that you could give the plaintiff and the defendant a fair trial on the merits, without any outside influence of any kind?

A. Yes.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. And if the Court should instruct you in this case that a man cannot excuse the results of his own voluntary acts, because he has been drinking, or is suffering from the effects of the excessive use of alcohol, would you follow such an instruction?

A. I would.

Q. Now, a number of questions have been put to you and with those questions in mind, do you think that if selected [fol. 455] in this case you could be a fair and impartial juror?

A. Yes.

Q. Would you be satisfied to submit it to a jury of twelve people in your present frame of mind?

A. Yes.

Q. You think you could decide this case wholly upon the merits as developed by the evidence and by the instructions of the court, without regard to any other consideration?

A. I do.

Mr. Spivock: Might I ask one more question?

Q. I represent the plaintiff here. Would you be perfectly willing, with that responsibility, to submit this case to twelve jurors in your present state of mind?

A. Yes.

Mr. Dunne: Counsel has referred in some little detail to the injury suffered by the plaintiff. Would you be inclined

to favor the plaintiff's case more, give more consideration to it because he was seriously injured than if that injury had only been slight?

A. No.

Q. In other words, you could decide the question wholly apart from whether his injuries were severe or slight?

A. Yes.

Mr. Dunne: I have no further questions.

The Court: You may inquire of the next juror.

Mr. Spivock: What is your name?

A. Freese.

Q. What is your business?

A. I am with Bancroft-Whitney Company.

The Court: In what capacity?

A. I am in the sales department.

Q. What is your position, do you go out and solicit orders for books?

A. No, I do not, I have charge of the sales inside of the house.

Q. You have charge of what?

A. Of the sales department, filling orders, etc.

Mr. Spivock:

Q. Are there many books that you sell to the Southern Pacific Company?

A. Not very many.

[fol. 456] Q. Have you sold any books to Mr. Dunne?

A. I don't know him.

Mr. Dunne: Might I say that it is a fact that Bancroft-Whitney have sold law books to me.

Mr. Spivock:

Q. You do not keep track of everybody, do you?

A. No.

The Court: Have you sold any to Mr. Spivock?

A. I can say no.

The Court: I suppose they sell books to all the lawyers they can.

Mr. Spivock:

Q. The fact that your firm does business with the Southern Pacific Company and has sold law books to Mr. Dunne, attorney for the defendant, Southern Pacific Company, would that influence your judgment in deciding this case?

A. Not at all.

Q. Let me ask you, if you had the responsibility I now have as attorney for the plaintiff in this case, who is in a very serious crippled condition, would you be satisfied in the trial of this case to have twelve jurors in your state of mind?

A. I would.

Q. You feel absolutely satisfied in your own mind that any business relations that you had with Mr. Dunne or with the Southern Pacific Company would not in the slightest degree affect your judgment?

A. Not at all.

Q. You have heard the questions I have asked the other jurors regarding the condition of the plaintiff at the time he went to the Reno station for the purchase of a ticket from the Southern Pacific Company, and would your answers be the same? In other words, would there be any prejudice in your mind, at all, against the plaintiff if he was mentally ill at the time he went to buy a ticket, because of some illness that was brought about by drinking a few days before, on account of disappointment with his marriage?

A. No.

[fol. 457] Q. This final question: If you were in the position of the plaintiff in this case, would you be entirely satisfied to have twelve jurors in your present state of mind to try your case?

A. Yes, I would.

Mr. Spivock: We pass the juror.

Mr. Dunne:

Q. Have you ever had any trouble with the Southern Pacific Company?

A. Not that I know of.

Q. Or have any members of your immediately family been injured in a railroad accident?

A. No.

Q. Can you think of any reason why, if you were selected here, you could not be a fair and impartial juror?

A. No.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: What is your name?

A. Mr. Knight.

Q. What is your business?

A. I am with Schwabacher-Frey.

Q. You have stated your firm does business with the Southern Pacific Company?

A. Yes.

Q. What sort of business is it?

A. Selling materials.

Q. Are you doing that business all the time?

A. I am not, no.

Q. I mean is your firm doing that business all the time?

A. I presume they are, although I don't know.

Q. Are there any sales that you personally have with any agents of the Southern Pacific Company?

A. No.

Q. The business is not done by you at all?

A. No.

Q. It is done by the firm?

A. It is not done by me, at all.

Q. Are you acquainted with any officials of the Southern Pacific?

A. No, I am not. I did know some sometime ago but it has been quite a long time ago.

Q. At the present time are there any people working for the Southern Pacific that you know, personally?

A. No.

[fol. 458] Q. Would you be satisfied to have this case tried by twelve jurors in your present frame of mind?

A. I would.

Q. You feel absolutely certain that you would not be swayed in any way by reason of any business connection of your firm?

A. I would not be swayed at all.

Q. You feel absolutely sure that you could give the plaintiff a fair trial in this matter?

A. I do.

Mr. Spivock: I will pass the juror.

Mr. Dunne:

Q. Can you think of any reason why, if selected as a juror, you could not be perfectly fair, as far as both sides are concerned?

A. I don't know of any reason.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mr. Kahn, what is your business?

A. Insurance broker.

Q. Do you d oany business with the Southern Pacific Company?

A. No.

Q. Are you acquainted with any of the officials of the Southern Pacific Company?

A. Well, I am acquainted with Blue, of the Traffic Department.

Q. How well are you acquainted with him?

A. I met him about a year and a half ago.

Q. How did you happen to become acquainted with him?

A. In the nature of our business, we are handling some of his personal fire insurance.

Q. In other words, you are handling some insurance business for him?

A. Yes.

Q. By reason of that connection that you have with an official of the Southern Pacific Company, would that in any way prejudice you against the plaintiff's case here?

A. None, whatever.

[fol. 459] Q. Would that have any tendency to make you favor the defendant Southern Pacific Company?

A. Not at all.

Q. Let me ask you, if you had the responsibility that I have of selecting a jury to try a case for the plaintiff against the Southern Pacific, would you be absolutely satisfied to have twelve jurors in your present frame of mind try the case?

A. I would.

Q. You think you could give the plaintiff a fair trial?

A. Yes.

Q. Your business connections that you have with the defendant company would not influence you in any way, at all?

A. Not at all.

Q. If the Court should instruct you where a mentally ill person is accepted by the railroad company with full knowledge that he is ill or acting crazy, and the court instructed you that the railroad had a duty to give care and protection to that person, would you follow that instruction?

A. I would follow the Court's instruction.

Q. And the other question that I asked the other jurors about being prejudiced because of the previous condition that caused him to lose his normal mind, would that in any way prejudice you against the plaintiff?

A. Not at all.

Q. Then you are perfectly sure, are you, in your own mind, that you would be perfectly satisfied, to have your case tried for you as plaintiff suing the Southern Pacific Company by twelve jurors in your present frame of mind that you are now in?

A. I would.

Mr. Spivock: I pass the juror.

Mr. Dunne:

Q. Mr. Kahn, various questions have been put to you as to what the Court might or might not instruct, let me put this question to you: If you were selected as a juror in this case would you follow the Court's instructions, whatever they might be?

A. Yes, I would. I would feel that it was my duty to [fol. 460] follow the Court's instructions.

Q. You will take the law from the Court, just as counsel would take their law from the Court?

A. I would.

Q. And so far as the facts are concerned, you will wait until you have heard them before you make up your mind?

A. I would wait until I heard the evidence.

Q. Just one other question: Can you think of any reason, or has any reason been suggested to you why you can't be perfectly fair to both sides if you were selected as a juror in this case?

A. I think I could be fair.

Mr. Dunne: That is all.

The Court: The next juror.

Mr. Spivock: Mr. Hohweisner, what is your business?

A. Insurance broker.

Q. Have you had any business relations with any one of the Southern Pacific Company?

A. No.

Q. Have you handled any insurance for anyone working for the Southern Pacific Company?

A. Not that I recall.

Q. If I were to ask you the same questions that I asked the other jurors would your answers be about the same, that is, would you have any prejudice against the plaintiff because the circumstances which brought about his mental illness?

A. No, I would not.

Q. If the Court instructed you that the defendant owed a special duty to a passenger that they knew to be out of his normal mind, would you follow the Court's instruction.

A. I would follow the Court's instruction.

Q. Is there any reason that you know of why you would not be able to give an absolutely fair trial to the plaintiff or to the defendant in this case?

A. I happen to have several friends among the officials of the Southern Pacific Company who are members of my [fol. 461] golf club, but that would not influence me.

Q. In other words, you are acquainted with some of the officers of the Southern Pacific Company?

A. Yes.

Q. How well acquainted are you with them?

A. Just through meeting them at the golf club.

Q. You feel definitely satisfied in your own mind that the mere fact that you met them socially or played golf with them would not affect you one way or the other in deciding this case, would not influence you?

A. I do not think it would.

Q. In other words, you are absolutely satisfied that you would decide this case on the evidence and the instructions, and the mere fact of the acquaintance would not influence your judgment one way or the other?

A. Yes.

Mr. Spiyock: I pass the juror.

Mr. Dunne:

Q. Can you think of any reason why you would have any prejudice or feeling against the Southern Pacific Company?

A. No.

Mr. Dunne: I have no further questions.

The Court: The next juror.

Mr. Spivock: Mr. Freise, do you do business with the Southern Pacific Company?

A. We do.

Q. What kind of business do you do?

A. We sell drawing material and blueprint material to the Southern Pacific, and I am acquainted with the head of the purchasing department.

Q. You are acquainted with the head of the purchasing department?

A. Yes.

Q. Are you acquainted with any other officials of the Southern Pacific Company?

A. I am not.

The Court: Pardon me, what kind of business did you say you were connected with?

[fol. 462] A. Drawing materials, surveying instruments, blueprint material.

By Mr. Spivock:

Q. About how much business do you do with the Southern Pacific Company?

A. I imagine a few hundred dollars a month.

Q. That business is handled personally by you with the purchasing agent?

A. Not exactly, but I have charge of the business, I have charge of the correspondence.

Q. The plaintiff, here, as you know, is in a very serious condition, and he is suing the Southern Pacific Company for damages because of injuries incurred while he was a passenger on this train. Would the fact that you are doing business with the Southern Pacific Company make you favor the Southern Pacific Company?

A. No, not at all.

Q. In other words, you are absolutely certain in your own mind that the mere fact that you are doing business

with the Southern Pacific Company would not sway you one way or the other in this case?

A. It would not, no, definitely no.

Q. Would you feel at all if you brought in a verdict for the plaintiff that would have a tendency to destroy your good will that you have with the Southern Pacific Company?

A. Oh, no.

Q. In other words, your present state of mind is you feel satisfied that if the evidence favored the plaintiff here you would bring in a verdict for him, regardless of whether you lost your business from the Southern Pacific Company?

A. That would not have any effect on me.

Q. You are sure in your mind that the business relations, or the possibility that your business might be cut off would not have the slightest influence upon your decision?

A. Yes.

Q. I have a very serious responsibility here, as I have pointed out, representing a man who is very seriously [fol. 463] injured, and will be for the balance of his life, and I would like to ask you if you were in my position and you were selecting a jury and this case was to be submitted to that jury, would you be satisfied if you were in my position to have the case tried by twelve men in your present frame of mind?

A. I believe I would.

Q. Are you absolutely satisfied about it?

A. Yes.

Q. You are absolutely satisfied in your present frame of mind you could give the plaintiff a fair trial?

A. Yes.

Q. And if the evidence favored the plaintiff you would not hesitate to bring in a verdict for plaintiff?

A. That is right.

Mr. Spivock: Pass the juror.

By Mr. Dunne:

Q. If the evidence favored the defendant would you have any hesitancy in bringing in a verdict for the defendant?

A. None.

Q. Can you think of any reason why you could not be as fair to one side as the other?

A. No.

By Mr. Spivock:

Q. How about the other question I asked the other jurors, whether there would be any prejudice in your mind because of the circumstances that brought about the mental illness, would that tend to prejudice you against the plaintiff?

A. Not at all.

Q. If the Court instructs you that where a railroad knowingly accepted a man who is mentally ill, having knowledge of his physical state of mind, and acting crazy, that they must exercise special care over him, would you follow such instruction?

A. I would, if there was such instruction.

The Court: The next juror.

By Mr. Spivock:

Q. What is your business, Mr. Bright?

A. I am a retired railroad postal clerk.

Q. Have you any acquaintances in the Southern Pacific Company?

[fol. 464] A. Well, I know Mr. Goldsmith for some years, and I was quite well acquainted with Mr. Hastings, I have not seen him for quite a number of years.

Q. Do you feel that your acquaintance with those people who are employed by the Southern Pacific Company would in any way have a tendency to bias you so that you would favor the Southern Pacific Company?

A. No.

Q. In other words, you are absolutely sure in your own mind that the mere fact that you know those people would not have any tendency to sway you as far as deciding the case on the actual evidence and the instructions of the Court is concerned?

A. Yes.

Q. You have heard the other questions that I have asked the other jurors about whether you have any prejudice, and your answer would be the same?

A. Yes.

Q. And you are absolutely satisfied if you were the plaintiff in this case against the Southern Pacific Company to have your case tried by twelve jurors in the same frame of mind that you are?

A. I would.

Mr. Spivock: I pass the juror.

By Mr. Dunne:

Q. Mr. Bright, if you were representing the defendant would you be satisfied to have twelve men on the jury like yourself?

A. Yes.

The Court: The next juror.

By Mr. Spivock:

Q. What is your business, Mr. Martens?

A. I am retired.

Q. What did you used to do?

A. I was in the commission business.

The Court: Handling products on a commission basis?

A. Yes.

By Mr. Spivock:

Q. Did you have any business with the Southern Pacific Company?

A. Many years ago I did.

[fol. 465] Q. But of late years have you had any business dealings with them?

A. No; not for ten or twelve years.

Q. Are you personally acquainted with any of the officials or people working for the Southern Pacific Company?

A. At the present time, no.

Q. Is there anything that you know of why you would not be able to give both sides a fair and impartial trial in this case?

A. No.

Q. Do you have any prejudice against the plaintiff because of his excessive drinking before he came to the station and bought a ticket and was in a bad state of mind at that time?

A. No.

Q. If the Court instructs you that where a prospective passenger comes to a ticket office of a railroad company and the ticket seller knows that the man is out of his mind and acting crazy, and that he was so informed by people who were with him, and the court instructs you that the railroad has a right to refuse to take him as a passenger,

and it does take him as a passenger and owes him special care, would you follow the instructions of the Court?

A. I would follow the instructions of the Court and the evidence.

Q. The evidence and the instructions of the Court?

A. Yes.

Q. Is there any reason that you know of in your own mind why you could not give the plaintiff a fair trial?

A. I will give him a fair trial.

Mr. Spivock: I will pass the juror.

By Mr. Dunne:

Q. Mr. Martens, if the Court did not instruct you as counsel has just stated you would disregard the statement of counsel which he has just made, would you not?

A. I would go according to the evidence.

Q. In other words, Mr. Martens, you would take the evidence from the witnesses and you would take the law from [fol. 466] the Court, and not from counsel in the case?

A. Yes.

Q. You would follow his Honor's instructions?

A. Yes.

Q. Whatever he instructed you, that is the thing that would be binding on you?

A. I would hear the evidence, too.

Q. And his Honor's instructions?

A. If his instructions were to my mind I would follow them.

Q. Suppose his Honor's instructions were not with your mind, would you follow his Honor's instructions, if you disagreed with him?

The Court: I think the juror should be advised as to that.

Mr. Dunne: I will accept your Honor's suggestion, and I think this is a fair statement, that there is a difference in function in the trial of a case between the function of the jury and the function of the Court. It is the function of the jury to decide questions of fact, and it is the function of the Court to decide questions of law, and it states the law to the jury in its instructions, and it is the duty of the jury to follow the Court's instructions and not your own idea of what the law should be, even if you think the Court

is wrong, but if you were instructed it was your duty to follow the instructions of the Court would you do that?

A. I would follow the instructions as to the law.

Q. Even if you disagreed with what the law was?

A. Yes.

Q. Can you think of any reason of why you could not be a fair and impartial juror in this case?

A. No.

Mr. Dunne: That is all.

The Court: The next juror.

Mr. Spivock; Mr. Gale, what is your business?

A. Insurance broker.

Q. You said that you owned stock in the Pacific Greyhound Line.

[fol. 467] A. Yes.

Q. That company is connected with the Southern Pacific Company, is it not?

A. I understand so.

Q. Would the fact that you owned stock in any way tend to prejudice you in favor of the Southern Pacific Company?

A. No.

Q. Is there anything you know of why you could not be a fair and impartial juror in this case?

A. No.

Q. Is there any business that you do with the Southern Pacific Company?

A. I have handled insurance of probably three of the company.

Q. Let me ask you this, as I asked the other jurors, I have a serious responsibility here as attorney for the plaintiff in this case, and I would like to ask you if you were in my position would you be satisfied to have twelve men sit on the jury in the same frame of mind as you are?

A. I certainly would.

Q. Are you absolutely satisfied that your business dealings with men with the Southern Pacific Company will not have the slightest effect in influencing your judgment in this case?

A. Yes.

Q. You feel absolutely certain in your own mind that in deciding this case you would do it solely on the evidence and the instructions of the Court, and not be influenced

in any way by any business dealings or acquaintance with anyone of the Southern Pacific Company?

A. Yes.

Q. You are absolutely sure of that?

A. Yes.

Mr. Spivock: I pass the juror.

Mr. Dunne:

Q. Mr. Gale, do you know of any reason why you could not be a perfectly fair juror to both sides?

A. No.

Mr. Dunne: I have no further questions.

The Court: Both sides having passed for cause, the [fol. 468] plaintiff may now exercise the first peremptory challenge.

Mr. Spivock: Plaintiff will excuse Mr. Freese.

The Court: That is Juror No. 5, Mr. Freese is excused. Call another juror.

The Clerk: Bert A. Gayman. (Sworn.)

The Court:

Q. Mr. Gayman, what is your business?

A. Link Belt Company, President.

Q. You are President of it?

A. Yes, Pacific Division.

Mr. Spivock:

Q. Do you have any business dealings with the Southern Pacific Company?

A. As a corporation, we must have.

Q. Are you presently acquainted with any of the officers of that company?

A. Not that I know of.

Q. You have already heard what this case involves, have you not?

A. Yes.

Q. It isas uit by a passenger against the Southern Pacific Company for a large sum of money by reason of a certain injury. Do you feel that your acquaintance and business relations with the Southern Pacific Company would have any effect in biasing or influencing you against the plaintiff?

A. I do not think so.

Q. You feel satisfied in your own mind of that?

A. Yes.

Q. After hearing the evidence and the instructions do you feel that if you brought in a verdict for the plaintiff it would affect in any way your business relations?

A. Absolutely not.

Q. Despite the fact that the verdict might be for a large sum, that would not?

A. That would not enter into it, whatsoever.

Q. Then are you absolutely certain in your own mind if you were in my position, representing the plaintiff, who was very seriously crippled, if you had the responsibility that I have, would you be perfectly satisfied to have twelve [fol. 469] jurors in your present frame of mind sitting in that case?

A. I would be glad to have them.

Mr. Spivock: Pass the juror.

Mr. Dunne: Did I correctly understand the Link Belt Company is a manufacturer of heavy machinery?

A. Yes.

Q. You stated that you did considerable business with the Southern Pacific; I take it you mean you are a shipper over the line?

A. Yes, we ship a great deal; it is a national organization, of which I am president.

Q. Can you think of any reason why you could not be perfectly fair as far as the defendant is concerned?

A. No.

Q. Your company has not had any row with the Southern Pacific Company?

A. It has not had a row with anybody.

Mr. Dunne: That is all.

The Court: The defendant's first peremptory.

Mr. Dunne: We will excuse Mr. Futernick.

The Court: Mr. Futernick is excused. Call another juror.

The Clerk: Edna Adrian. (Sworn.)

The Court: Proceed.

Mr. Spivock:

Q. Mrs. Adrian, what is your business?

A. Housewife.

Q. What does your husband do?
A. Civil engineer.
Q. Working for whom?
A. His own business.
Q. What is the name of his business?
A. Adrian, civil engineer.
Q. As a civil engineer?
A. That is right.
Q. Do you know whether he does any business with or for the Southern Pacific Company?
A. Not that I know of.
Q. Do you know whether he is acquainted with any officials or people working for the Southern Pacific Company?
A. Not that I know of.
[fol. 470] Q. I believe you heard the questions that have been asked here of the other jurors, which I propounded to various jurors, and would your answer be about the same?
A. They would.
Q. You would have no prejudice against the plaintiff by reason of his drinking?
A. No.
Q. If the Court instructed you that the railroad owed a special duty would you follow the Court's instructions?
A. I would follow the Court's instructions.
Q. Do you know of any reason whatever why you could not give a fair trial to either the defendant or the plaintiff in this case?
A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. Mrs. Adrian, are you acquainted with any persons whose names have been mentioned in connection with this case?
A. No.
Q. Parties or attorneys?
A. No.
Q. If you were in my position would you be satisfied to have a jury of twelve persons in your present frame of mind?
A. Yes.

The Court: The plaintiff's second [illegible]ptory.
Mr. Spivock: The plaintiff will excuse Mr. Kahn, No. 7.
The Court: Mr. Kahn is excused. Call another juror.
The Clerk: Clarence E. Allan. (Sworn.)

Mr. Spivock:

Q. Mr. Allan, what is your business?
A. Insurance.
Q. A broker, I take it?
A. No, manager of an insurance company.
Q. What company is that?
A. Northern Assurance Company.
Q. Do you have any business dealings with the Southern Pacific Company?
A. We have insurance placed with that company by the brokers.
Q. By the Southern Pacific Company brokers?
A. Yes.
[fol. 471] Q. Do you also handle some insurance for employees and officers of the company?
A. Not that I know of, we may.
Q. As you know in this particular case the Southern Pacific Company is being sued for a great deal of damages; would the fact that your company is doing business with the Southern Pacific Company tend to bias you or influence you in any way for or against the Southern Pacific Company?
A. No, it would not.
Q. Would you have any feeling of fear if you brought in a verdict for plaintiff which was justified under the instructions and the evidence—would you have any fear that that might affect your future business relations with the Southern Pacific Company?
A. Not at all.
Q. Then, let me ask you this, is there any reason at all that you know of why you cannot give a fair and impartial trial to the defendant or the plaintiff?
A. No.
Q. And if there was an accident in which you were personally involved and you were suing the Southern Pacific Company would you be absolutely satisfied to have your case submitted to twelve jurors in your present frame of mind?
A. I would.

Mr. Spivock: Pass the juror.

Mr. Dunne: I have no questions.

The Court: The defendant's second peremptory challenge.

Mr. Dunne: I will excuse Mrs. Adrian.

The Court: Mrs. Adrian is excused. Call a substitute.

The Clerk: Daniel J. Desmond. (Sworn.)

Mr. Spivock:

Q. Mr. Desmond, what is your business?

A. Real estate.

Q. What position do you hold?

A. Vice-president.

Q. Does your company do any business with the Southern Pacific Company?

A. Yes.

[fol. 472] Q. Quite a bit of business?

A. In the neighborhood of $50,000 a year.

Q. You mean you pay that much in freight rates?

A. Yes.

Q. Are you personally acquainted with any officials or employees of the Southern Pacific Company?

A. I am.

The Court: It seems to me where there is a continuous business relationship, even though he is just a shipper, that it is quite a natural thing that the juror, himself, would like to be excused, and I think he ought to be, and I will excuse him.

Call a substitute juror for Mr. Desmond.

The Clerk: Mrs. Norma Walsh. (Sworn.)

Mr. Dunne: If your Honor please, before Mrs. Walsh is called, her husband is a captain in the United States Army, and is here on only a few days leave. If counsel on the other side will consent, we will consent that Mrs. Walsh be excused.

Mr. Spivock: I have no objection if Mrs. Walsh desires to be excused. Do you desire to be excused?

Mrs. Walsh: Yes.

Mr. Spivock: I have no objection.

The Court: You may be excused. Call a substitute juror.

The Clerk: Elliot McAllister. (Sworn.)

Mr. Spivock:

Q. Mr. McAllister, what is your business?

A. With the Bank of California.

Q. What position do you hold there?

A. Vice-president.

Q. Do you have any business dealings with the Southern Pacific Company, or any of its officers?

A. The Southern Pacific Company keeps an account in the bank.

Q. Are you personally acquainted with the officers or agents that come to your bank for the Southern Pacific Company?

A. No, I am not. It does not happen to be an account [fol. 473] that I have anything to do with.

Q. Then are you personally acquainted with any agents or employees at all—are you personally acquainted with any of them?

A. No.

Q. Would the fact that your bank does business with the Southern Pacific Company tend to have the slightest influence or prejudice you in any way to favor the Southern Pacific in this case?

A. No. I would decide the case on the evidence and the Court's instructions.

Q. Would you have the slightest fear in your own mind at this moment that if you brought in a verdict for the plaintiff in any substantial amount that it might hurt the bank in its relations with the Southern Pacific Company?

A. No, not at all. I am a personal friend of Mr. Dunne. I have known him about twenty years.

Q. You are a personal friend of Mr. Dunne?

A. Yes.

Q. Would that circumstance embarrass you at all in performing your duty as a juror?

A. No, I would decide this case on the evidence and the Court's instructions.

The Court: You think you could lay that aside, your acquaintance with Mr. Dunne, and accept the law and the evidence in this case?

A. Yes.

Mr. Spivock: I will challenge the juror for cause. I believe his long acquaintance for twenty-five years is bound to embarrass him.

The Court: You might state a little bit more in detail the nature and extent of your association and friendship with Mr. Dunne.

A. We both entered the University of California along in the '90's.

Q. Were you friends there?

A. Yes, friends there.

Q. You saw a good deal of each other at that time?

A. Yes.

Q. Since that time you have kept up your friendship? [fol. 474] A. Off and on. I have not seen a good deal of Mr. Dunne, we meet at social gatherings.

The Court: Do you have any objection to his being excused?

Mr. Dunne: Your Honor puts me in an embarrassing position, because certainly there has been no cause shown. I will consent to the excuse of the juror so that counsel does not have to use a peremptory challenge, but I think it goes very far from good cause.

The Court: Yes, as in the case of Mr. Desmond, I do not think there is any real basis for cause shown, but I do not like to have on the jury a personal friend of anybody connected with the case. I do not think it is a good idea, irrespective of cause being shown.

Mr. Dunne: I will call to your Honor's attention I was required to use a peremptory challenge to remove a personal friend of Mr. Spivock's.

Mr. Spivock: I call to your attention that counsel did not challenge him for cause.

The Court: He may be excused. Call another juror.

The Clerk: James A. Levensaler. (Sworn.)

Mr. Spivock:

Q. What is your business?

A. General insurance.

Q. Do you do any business for the Southern Pacific?

A. No, not directly.

Q. Which way do you do? When you say "not directly," what do you mean by that?

A. Some of the employees.

Q. Some of the employees of the company?

A. Yes.

Q. You have heard the questions that were propounded this morning; there is no use of my going over them again. Are you familiar with all of those questions?

A. I am.

Q. Is there any reason that you know of why you cannot [fol. 475] give either side a fair and impartial trial?

A. I don't know of any.

Q. Would the fact that you may have done some business with some of the agents of the Southern Pacific Company in any way have the slightest tendency to prejudice you in deciding this case?

A. No.

Q. If you were in the plaintiff's position, seeking damages against the Southern Pacific Company, would you be absolutely satisfied to submit the case to twelve jurors in your present frame of mind?

A. I would.

Q. There is no reason that you know of, then, why you could not serve as a juror here and give a fair and impartial trial?

A. I think not, no.

Q. Nothing that you know of that might influence you one way or the other?

A. I know Mr. McInnes, of the Southern Pacific Company.

Q. Are you personally acquainted with him?

A. Yes.

Q. The fact that you are personally acquainted with Mr. McInnes, who is an important official of the Southern Pacific Company—is he not?

A. Yes.

Q. Would that have the slightest tendency to influence you in deciding this case?

A. None, whatever.

Q. Would you have the slightest fear in your mind at this moment if you brought in a verdict against the Southern Pacific that that would in any way affect your relations with Mr. McInnes?

A. No.

Q. You feel absolutely sure that you would be guided solely by the evidence and the instructions, and not by any outside influence, such as knowing Mr. McInnes, or anyone else?

A. Yes.

Mr. Spivock: Pass the juror.

Mr. Dunne: I have no questions.

The Court: The plaintiff's third peremptory.

[fol. 476] Mr. Spivock: Will your Honor pardon me just a moment, this is the last peremptory that I may take.

The Court: Yes.

Mr. Spivock: The plaintiff will excuse Mr. Allan.

The Court: Mr. Allan will be excused. Call another juror.

The Clerk: Arthur D. Levis. (Sworn.)

Mr. Spivock:

Q. Mr. Levis, what is your business?

A. I am with the Walter Ellis Company.

Q. What sort of business are they in?

A. They handle meal and food stuff.

The Court: What is your capacity?

A. Office manager.

Mr. Spivock:

Q. Does your company have any business with the Southern Pacific Company?

A. Yes, considerable.

Q. How much a year?

A. I could not say off-hand in dollars and cents.

Q. You are continuously engaged in shipping over the Southern Pacific Lines?

A. Practically every day.

Q. Continuously in contact with the agents and employees of the company?

A. Not myself, personally, but our office is.

Q. Your office is, and that is supervised by you?

A. Yes.

Q. Have you any rough idea of the amount of the shipping business per year?

A. $50,000, or more.

Mr. Spivock: His continuous business with the Southern Pacific Company may be embarrassing in this case, and therefore I will challenge for cause.

Mr. Dunne: We will resist the challenge.

The Court: You may be excused.

Mr. Dunne: Note an exception.

The Court: Exception allowed. Call another juror.
The Clerk: Frank C. Kugelberg. (Sworn.)

[fol. 477] Mr. Spivock:

Q. Mr. Kugelberg, what is your business?

A. Importing and exporting.

Q. You are located where—in San Francisco?

A. Yes, 215 Market street.

Q. Do you have any business with the Southern Pacific?

A. A very moderate amount, yes, because some of the freight comes overland.

Q. About how much per year would that business amount to?

A. I would say not to exceed $5000.

Q. A year?

A. A year.

Q. You have heard all of the questions that have been propounded here this morning to the various jurors?

A. I heard practically all of them. However, I was in the rear of the court-room, and at times the voices did not always carry.

Q. Would the fact that your firm is doing $5000 worth of business—first, let me ask you, are you the owner of this business?

A. No, I am not, I am simply a department manager.

Q. Would the fact that your firm is doing $5000 a year business shipping on the Southern Pacific tend to influence you in any way in deciding this case?

A. No, it should not have any effect.

Q. You say it should not?

A. It would not.

Q. Are you absolutely sure that it would not have the slightest effect?

A. Yes, I am sure of that.

Q. Absolutely sure?

A. Yes.

Q. In other words, there is not the slightest fear in your mind that if you brought in a substantial verdict for the plaintiff that it would hurt you in some way in your dealings with the Southern Pacific Company?

A. No, I am sure it would not.

Q. If the evidence and instructions plainly showed that the plaintiff should have a verdict in this case, you would [fol. 478] not hesitate to bring it in?

A. I would not.

Q. The fact that you are doing business with the Southern Pacific Company would not have the slightest effect on your judgment?

A. No, it would not.

Q. You have heard the other questions as to whether or not you would have any prejudice against the plaintiff because he was drinking, he was mentally ill—would that prejudice you in any way against the plaintiff?

A. No, it would not. I would decide the case entirely on the evidence and instructions of the Court.

Q. Is there any reason that you know of, or that you can think of, in your mind at all, why you could not give the plaintiff or the defendant a fair and impartial trial?

A. No, there is not.

Q. Let me ask you, if you were in the position of the plaintiff here, suing the Southern Pacific, would you be absolutely satisfied to have twelve jurors in your present frame of mind decide your case?

A. Yes, I would.

Q. You would be absolutely satisfied?

A. Yes.

Mr. Spivock: Pass the juror for cause.

Mr. Dunne: I have no question.

The Court: The defendant's third peremptory.

Mr. Dunne: The defendant is satisfied.

Juror Gayman: I think I ought to speak up, if I may. The business that we have been doing, shipping, is very large, we are a national concern, and we are a large shipper over the railroad.

The Court:

Q. You are certain it would not make any difference to you?

A. I am certain it would not make any difference.

Mr. Spivock: I will enter the same challenge for cause. [fol. 479] The Court: I do not think that we should have on the jury persons that have business relations, and while I believe that you will be able to lay aside that consideration, I do not think you ought to be put in the position of doing so, and so you are excused.

Call another juror.

The Clerk: Mrs. Mabel Lange. (Sworn.)

Mr. Spivock:

Q. Mrs. Lange, what is your business?
A. Housewife.
Q. What does your husband do?
A. Salesman for the Tonkin Distributing Company.
Q. What kind of business?
A. It is liquor business.

Mr. Spivock: If your Honor please, I might say I am acquainted with the lady's husband, I have spoken with him.

Q. Mr. Lange is sales manager there?
A. Yes.
Q. You have heard the questions propounded to the various jurors here, Mrs. Lange?
A. Yes.
Q. Would your answers be about the same, that you could give the plaintiff and the defendant a fair and impartial trial?
A. Yes.
Q. Does the Tonkin Distributing Company do business with the Southern Pacific?
A. Yes.
Q. In fact, they do a very large business, do they not, over $50,000 a year?
A. I don't know what the amount is, I know it is a large amount.
Q. They are continually shipping and exporting liquors of all kinds?
A. Yes.

The Court: Does the defendant wish the juror excused?
Mr. Dunne: I think, under your Honor's ruling.
The Court: You may be excused. Call a substitute for Mrs. Lange.

[fol. 480] The Clerk: Julian H. Hales. (Sworn.)

Mr. Spivock:

Q. What is your business?
A. I am a rice broker.

The Court:

Q. What kind of a broker?

A. Rice.

Mr. Spivock:

Q. In other words, you handle rice as a commission agent, or something of that kind?

A. Yes, and selling it on a commission.

Q. Do you have much dealings with the Southern Pacific Company?

A. Sometimes of the year, yes.

Q. In what way?

A. Just to ship for customers.

Q. Are you personally acquainted with some of the agents and officials of the company?

A. In the Freight Traffic Department, yes.

Q. Whom do you know there?

A. I know the head of the Freight and Passenger Department.

Q. Do you receive favors from him?

A. No more than would be done for anyone else.

Q. You have heard the questions propounded here. Do you think your acquaintance and your business dealings with the Southern Pacific would have the slightest tendency to bias you at all in the trial of this case?

A. No, I do not see why it should.

Q. Are you absolutely positive?

A. Yes.

Q. The plaintiff is very seriously injured, and it is very important for the plaintiff to have twelve jurors whose minds are free and clear of the slightest prejudice in favor of the Southern Pacific Company. Now, by reason of the responsibility that I have in attempting to select jurors who will be fair, with all that in mind, are you actually positive that there would not be the slightest tendency in your mind, because of your dealings with them, in favor of them?

A. No, I am positive I would not be prejudiced toward [fol. 481] either side.

Q. Is there the slightest fear in your mind if you should render a large verdict for the plaintiff in this case, who was very seriously injured, that that would in any way affect your relations with the Southern Pacific Company?

A. No.

Q. It would not affect your mind a bit in arriving at a decision if you were accepted as a juror?

A. No.

Q. If you were in the plaintiff's position and suing for damages against the Southern Pacific Company, would you be satisfied to have your case heard and decided by twelve jurors in your present frame of mind?

A. Yes, I would.

Mr. Dunne: I have no questions.

The Court: The Clerk will call a substitute juror Freise, Juror No. 9, whom I will excuse.

The Clerk: Carl Wolbach. (Sworn.)

Mr. Spivock:

Q. What is your business?

A. I am a director of Haas Bros.

Q. Does it do a great deal of business with the Southern Pacific Company?

A. Yes.

Q. Over $50,000 a year?

A. Yes.

Mr. Spivock: We raise the challenge.

The Court: You may be excused.

Mr. Dunne: We respectfully note an exception.

The Court: Allowed. Call a substitute juror.

The Clerk: William H. Lutz. (Sworn.)

Mr. Spivock:

Q. Mr. Lutz, what is your business?

A. Retired.

Q. What did you used to do?

A. Steel erector.

Q. Have you had any business dealings with the Southern Pacific Company?

A. No.

[fol. 482] Q. Are you acquainted with any of the officers or employees of the Southern Pacific Company?

A. No, I am not.

Q. Is there any reason you know of why you could not give both the defendant and plaintiff a fair trial in this case?

A. No.

Q. You have heard all of the questions propounded to the jurors?

A. I think I have, most of them.

Q. Would your answers be the same or different?

A. No.

Q. About the same?

A. Yes.

Q. You would have no prejudice against the plaintiff by reason of any previous drinking causing his condition?

A. No.

Q. If the court instructs you regarding the duties of a railroad in accepting a passenger who they know is out of his mind, would you follow those instructions?

A. I would.

Q. If you were in the position of the plaintiff here, seriously injured while a passenger on the railroad, and you were suing the Southern Pacific Company, would you be entirely satisfied to have your case tried by twelve jurors in your frame of mind?

A. Yes.

Q. Is there any reason that you can possibly think of that would affect you so that you could not give an absolutely fair trial?

A. No.

Mr. Spivock: Pass the juror.

Mr. Dunne:

Q. You can be fair to both sides in this case?

A. Yes.

Q. Can you think of any reason why you could not be just as fair to one side as the other?

A. No.

The Court: The defendant may now exercise its third peremptory challenge confined to Mr. Hales, Mr. Lutz, and Mr. Wohlbach.

Mr. Dunne: We respectfully do not care to exercise the third peremptory challenge.

[fols. 483-484] The Court: The plaintiff having exercised all of its available peremptory challenges, and the defendant having accepted the jury, does the plaintiff accept the jury?

Mr. Spivock: Yes, subject to a motion which I will make outside of the presence of the jury.

The Court: Let the jury be sworn.

(Thereupon the jury was sworn.)

Mr. Spivock: If your Honor please, this case may take quite a little while, and I think it would be advisable to have an alternate juror.

The Court: The Court is not advised of any condition that makes it think that it is necessary now. I am going primarily on the opinion that no person in the jury box entertains any feeling of becoming ill. I will ask the jurors. The Court understands your silence to mean you do not know of any serious illness of any sort, so the Court will not impanel an alternate juror.

* * * * * * *

[fol. 485] Afternoon Session, Tuesday, November 24, 1942 —2 P. M.

The Court: You may proceed.

CHALLENGE TO JURORS

Mr. Spivock: If your Honor please, for the sake of the record, at least, plaintiff at this time would like to enter a challenge to the twelve jurors chosen to try this case; and the challenge is made for cause, first, on all the grounds which have been set forth in plaintiff's previous motion to strike out the entire jury panel, which grounds and which motion are hereby referred to by plaintiff and made a part of this motion; and also upon the further ground that by actual experience in the selection of these twelve jurors it now appears that there are on the jury which has been selected to try this case at least six jurors who are closely affiliated and connected with the Southern Pacific Company, the defendant in this case, as follows:

Mr. Gale, juror No. 12, owns stock in the Pacific Greyhound Company, which he knows to be a subsidiary of the Southern Pacific Company.

Mrs. Goeppner's husband is a florist who does considerable business with the Southern Pacific Company, and Mr. Dunne, opposing counsel, has a charge account at her husband's place of business. I might state Mrs. Goeppner is Juror No. 4.

Mr. Hohweisner, Juror No. 8, an insurance broker, plays golf and is very intimate socially with many of the officials and officers of the Southern Pacific Company.

Mr. Levensaler knows the head ticket agent and a very high official of the defendant Southern Pacific Company. Mr. Levensaler is Juror No. 3.

Mr. Knight is an important executive, sales manager, of [fol. 486] the Bancroft Whitney Company, a law book firm that sells over fifty thousand dollars——

The Court: I think someone has already challenged him.

Mr. Spivock: No, Mr. Knight——

The Court: He is a salesman for a stationery business—Mr. Knight.

Mr. Spivock: Pardon me, then.

The Court: I think the gentleman you are thinking about from the law book company, Mr. Freese, has already been challenged, and has been excused from the jury.

Mr. Dunne: That is correct.

Mr. Spivock: Oh, yes, there is a slight confusion; your Honor is correct. Mr. Knight—I have a notation here that his firm does business with the Southern Pacific Company. In other words, he is an executive of some type. In the short time, as your Honor realizes, I haven't got this sufficiently prepared. But he is an important officer or agent, to put it mildly, of Schwabacher-Frey Company, a very large corporation in San Francisco, here, which does a considerable business with the Southern Pacific Company.

The Court: I understood he occupied the high position of salesman in that concern.

Mr. Spivock: It isn't absolutely clear to me whether it was sales manager, or ordinary salesman; I am not absolutely certain. Mr. Knight was Juror No. 6.

And then Mr. Bright, Juror No. 10, although he is a retired postal clerk, he has ridden on many Southern Pacific trains, and is well acquainted with Mr. Goldsmith, of the Traffic Department of the Southern Pacific Company.

I cite this for the reason that, under the decision in Knox [fol. 487] v. Alabama, the United States Supreme Court has said that although the selection of a jury may appear fair and impartial on its face, if in truth and in fact the effect of that method used to select the jury is such that either one party or the other is deprived of his constitutional right to a fair jury trial, then there has been discrimination against the rights of the plaintiff in this particular case.

I point out to your Honor, aside from the fact that there are six on the jury now, that there were at least four, or five, or six or more that were actually excused by your Honor even because of their close connections and associations in business with the Southern Pacific. So I believe there has been a very powerful showing here on the evidence given alone that the method used in selecting the jury is such, that is, the executives and the business people that are selected and the manner which is used to select primarily business people out of such a large city as San Francisco, where there are hundreds of thousands of jurors that could be selected that have no particular affiliation or association with the Southern Pacific Company—the selection has been almost entirely of the business and executive type that is bound to have business with the Southern Pacific Company. And it has been proven by actual experience and test here this morning to such an extent that plaintiff is now in the predicament of being forced to go to trial before a jury which he even endeavored to have stricken out in this case, but is here now only because the defendant refused to consent to that—the plaintiff is in the predicament now of being forced to trial before a jury where he knows in advance, after he has exercised every challenge which the law allows him, of three, that there are at least six people [fol. 488] on there that should not ordinarily be on there if there was a fair and impartial selection of jurors to begin with. In other words, when you start off to begin with the wrong system, it is almost axiomatic that the final result is bound to be wrong. And, as I stated before, from the great number of jurors which appeared here to-day, doing big business and small business, and having acquaintanceship with the executives and officials of the Southern Pacific, I believe it is apparent that in substance and effect the method of selection used here is decidedly unfair as far as the plaintiff is concerned, as far as his right to a fair and impartial jury trial is concerned.

The Court: If it was said in the record it both escaped my attention and I did not hear it; it may be that the record shows that the Greyhound Lines, in which Mr. Gale said he owned some stock——

Mr. Spivock: Yes.

The Court: I remember he said something about owning some stock in the Greyhound; but if he said that that con-

cern was owned in part by the defendant railway company, or if the railway company owned some interest in the Greyhound, that escaped my attention.

Mr. Spivock: No; I am confused——

The Court: Why didn't you bring that to my attention before the remainder of the jury panel was excused?

Mr. Spivock: It slipped my attention for the moment, if your Honor please, because I was trying my hardest to get off the people that were more closely connected with the Southern Pacific Company. The Pacific Greyhound is a subsidiary owned and controlled by the Southern Pacific. I know they own the majority stock, and the juror was [fol. 489] stating he understood they did not. It was a little bit remote, and I felt your Honor would not allow a challenge for cause, being somewhat remote. I got to the point we were excusing so many that I did not know just where we were going to stop here this morning; we were just excusing them one after another, and, as I said, when I got through I still had six I would like to exercise peremptory challenges because I was brought to an automatic stop, and they might argue that challenges for cause as to any bias——

The Court: I would like to be advised as to the relationship between the Greyhound Company and the defendant company. I did not know there was any relationship.

Mr. Spivock: Mr. Dunne can correct me. I am positive the juror stated it is a subsidiary.

Mr. Dunne: Your Honor, I have no recollection of any such statement in the record. The second thing is, your Honor wants to know if there is any relationship.

The Court: If there is in fact any interlocking stock or interlocking directorate.

Mr. Dunne: Now, so far as interlocking directorate is concerned—and your Honor must understand I am speaking now from general understanding and could be mistaken, but my understanding is that there is no interlocking directorship relationship as between the two companies. If there were, it would have to be one to be passed on by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act and the Clayton act.

As to stock interest, it is my understanding that there is some stock interest; that the Southern Pacific Company owns a minority stock interest in the Pacific Greyhound

Company. How much that is and just what the relation [fol. 490] between the two corporations is I am not prepared to say; but it is my information that Southern Pacific Company is a stockholder of Pacific Greyhound, and a minority stockholder.

Mr. Spivock: I believe that is an understatement. It is common knowledge, I think, of anyone, that the Pacific Greyhound and the Southern Pacific are very closely connected.

Mr. Dunne: It isn't common knowledge.

Mr. Spivock: I have known it for years.

Mr. Dunne: Counsel knows a great many things that do not appear on the record; and while I have the opportunity, I want to say that counsel, here has made a number of misstatements as to what occurred during the impanelment of the jury, and what the jurors said. As to those, I don't want to argue the matter; I simply don't want by my silence to have it understood that I am acceding to any of those statements.

The Court: Do you wish to make any response to this matter, at all, and particularly with reference to Juror Gale, who said he owned some stock in a company that both of you admit is owned in part—or in respect to which the defendant company has a minority stock interest?

Mr. Dunne: I have a number of things to say about that. First, Mr. Gale answered truthfully the questions that were put to him, which was all that was required of him; secondly, there was no challenge for cause; thirdly, there was no attempt to exercise a peremptory challenge as to Mr. Gale, or no attempt to exercise more than the three peremptory challenges. In the fourth place, the jury has been exhausted, has been accepted; and in the fifth place, counsel, upon his own statement to your Honor, says that he has known what he claims to be the fact as to the relationship between the Greyhound Company and the Southern [fol. 491] Pacific Company for a good many years; and lastly, it is not a ground for challenge for cause. Your Honor was very liberal this morning with counsel upon both sides in excusing jurors when there was no ground for challenge for cause, where there was no relationship of debtor and creditor, where people were only employees of corporations who had normal business with carriers.

I notice that counsel was very careful not to ask the man who worked in the shipyard whether his shipyard did

any business with the Southern Pacific Company. I think your Honor could take judicial notice that all shipyards are receiving freight over the lines of the Southern Pacific Company. I am suggesting those things because I think counsel has assumed an unfair attitude, after the great liberality your Honor showed this morning.

The Court: The thing that is most important here to the Court is that this matter as to the Juror Gale has been allowed to reach this stage after the Court had already excused the remaining panel and would have no jurors present from whom to select; and if counsel had advised the Court or called this particular objection to the attention of the Court, before the other jurors were excused, the Court then could have had an opportunity to consider, in the light of that situation, what might be done about it. But, as I recall, when I asked counsel for the plaintiff if he accepted the jury, he said he accepted the jury subject to this motion which he hoped later to make.

Mr. Dunne: That is right, your Honor.

The Court: And at that time he did not advise the court that he had any specific objection for cause against this juror.

Mr. Spivock: It was an oversight on my part, evidently, [fol. 492] and then, again, I had exhausted my three, so it just slipped my mind. I just couldn't go any further, anyway. That was the situation; I felt that I had to take what was left; I just couldn't——

The Court: Do you have in mind any authority, Mr. Spivock, to show to the Court that it is a basis of a challenge for cause, this fact that Mr. Gale owns stock in the Greyhound and that part of the Greyhound stock is owned by the Southern Pacific; in other words, that the juror and the defendant are evidently stockholders of the same concern?

Mr. Spivock: I have no authority, but I am quite sure there would be something along that line.

Mr. Dunne: If your Honor please, of course, that would be upon the ground of mutual financial interest.

The Court: Yes.

Mr. Dunne: The ground of mutual financial interest in this State, under the statute, is a ground for disqualification of a judge. That precise matter I had before the Supreme Court of this State in the case of Central Pacific

Railroad Company v. The Superior Court. The situation was this: An action was brought by the Central Pacific Railroad Company to condemn land for the purpose of smoothing some curves in the Siskiyou Mountains, as the trains come over down into the Sacramento Valley, for the purpose of permitting the use of heavier equipment and speeding up the traffic. The case was tried before Judge Luttrell in Siskiyou County. It developed that a part of this land was subject to mortgage to the Bank of Italy, a banking corporation. It also developed that Judge Luttrell was a depositor with the Bank of Italy. In addition to that, the Bank of Italy was an operating banking corporation; its stock was wholly owned—not a question [fol. 493] of a minority interest, but its stock was wholly owned by a corporation known at that time as Bank of America, or Bancamerica Corporation. Judge Luttrell was a stockholder of that parent corporation. The Supreme Court of this State held that he was not disqualified. I call that to your Honor's attention, because it occurs to me immediately, and it was a question of stock ownership where our California statute, in respect to the qualification of judges, had a definite provision in respect of stock ownership. That was too remote. It was held that it was not ground for disqualification. And I think that if counsel will look at the statute he will find——

The Court: Do you claim that Greyhound profits by the operation of the Southern Pacific Company, the defendant in this case?

Mr. Spivock: I don't believe so. My general knowledge would be that the Pacific Greyhound is a subsidiary, and unless I am very badly mistaken that is exactly what Mr. Gale said.

The Court: The reverse would be true, would it not, that you would suppose that the Southern Pacific Company would hope to profit by the operation of the Greyhound Lines; is that not probable?

Mr. Spivock: It would seem that that is probable. However——

The Court: But you wouldn't, would you, expect the Greyhound Lines to profit by the operation of the Southern Pacific Company?

Mr. Spivock: Probably not, except——

The Court: Then if that is a proper analysis of the situation, a stockholder in the Greyhound Lines could not hope to profit or lose by virtue of a jury's verdict in this case against the Southern Pacific; is that not the case?

Mr. Spivock: That is probably true, and it is possible [fols. 494-987] that that was what was going through my mind when I did not immediately exercise the peremptory, your Honor, against Mr. Gale.

ORDER DENYING CHALLENGE TO JURORS

The Court: There not having been any challenge for cause of any juror that is here sworn to try this case, and all of the peremptory challenges having been exercised by the plaintiff, and considering the juncture at which we have now arrived, particularly the circumstance that all of the jury panel remaining other than those sworn to try the case have been excused; and considering also the merits of this motion and believing as I firmly do, that as a matter of fact, the plaintiff has a fair jury to try his case—I have listened very carefully to the interrogation of jurors by counsel on both sides; the Court interposed some questions directed to the jurors; and the Court has considered the business and social connections of the jurors with a view to testing as to whether they might be considered fair to both sides in this litigation—and after giving this consideration, and hearing these questions asked, and hearing the answers given by the jurors, the Court is firmly convinced that this jury is in fact a fair jury, and the motion is denied.

[fol. 988] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10,681

GILBERT E. THIEL, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of California, Southern Division

OPINION—Filed May 15, 1945

Before Mathews, Stephens and Healy, Circuit Judges

MATHEWS, Circuit Judge:

Appellee, Southern Pacific Company, a Kentucky corporation, was at all pertinent times a common carrier engaged in the business of operating railroads and railroad trains and transporting freight and passengers for hire. Two places between which appellee operated trains and transported passengers were Reno, Nevada, and San Francisco, California. One of the trains operated by appellee between Reno and San Francisco was train No. 9.

On February 25, 1940, appellant, Gilbert E. Thiel, a citizen of California, was a passenger on appellee's train No. 9, having boarded it at Reno to go to San Francisco. Appellant seated himself by a window in one of the day coaches—the one called the smoker. The train left Reno at 8:50 P.M. Twenty-five minutes later, at a point in Nevada between Verdi, Nevada, and Truckee, California, while the train was traveling at a speed of about 35 miles an hour, appellant opened the window, leaped out, fell to the ground and was injured.

The train was stopped and was backed to the place where appellant had fallen. Appellant was put on a stretcher and put aboard the train—in the baggage car. [fol. 989]The train then proceeded to Truckee. There appellant was removed from the train and was treated by appellee's district surgeon, Dr. J. H. Bernard, after which, on February 25, 1940, he was taken in an ambulance to a hospital in Reno, where he remained under treatment for several months.

On December 30, 1940, appellant brought an action against appellee for damages in the sum of $250,000 for the injuries resulting from his leap from the train. The complaint, in substance and effect, alleged that appellant was "out of his normal mind" on February 25, 1940; that before accepting appellant as a passenger, appellee was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; that appellee nevertheless accepted appellant as a passenger, left him unguarded and, when he leaped, failed to stop the train before he fell to the ground; and that appellee's said conduct constituted negligence and caused appellant's injuries.

The action was brought in the Superior Court of the State of California in and for the City and County of San Francisco, but, on petition of appellee, was removed from that court to the District Court of the United States for the Northern District of California. There, on February 24, 1941, appellee answered. The answer, in substance and effect, denied that appellant was "out of his normal mind" on February 25, 1940; denied that appellee was informed that appellant was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded; denied that appellee was guilty of any negligence; alleged that appellant's injuries were caused by his own negligence; and, as a separate defense, alleged that his injuries were contributed to by his own negligence.

On March 5, 1941, appellant filed in the District Court a written demand for a jury trial. Two months later he moved the District Court to remand the action to the Superior Court. The motion was denied. Thereafter, disregarding the removal and the refusal to remand, appellant attempted to prosecute the action in the Superior Court. Appellee thereupon applied for and, after a hearing, obtained from the District Court a judgment enjoining such prosecution. That judgment was affirmed by us [fol. 990] on March 20, 1942.[1] Certiorari to review our decision was denied on June 1, 1942.[2]

On October 12, 1942, the action was assigned for trial on November 24, 1942. Prior to November 5, 1942, a

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[1] 126 F. 2d 710.

[2] 316 U. S. 698.

panel of prospective jurors was drawn—the panel from which a trial jury was to be and was thereafter empaneled. On November 5, 1942, appellant challenged the array—the panel of prospective jurors drawn as aforesaid.[3] The challenge was overruled.

On November 19, 1942, appellant amended his complaint by adding thereto paragraph VIIa, which, in substance and effect, alleged that appellee was negligent in failing to give appellant first aid treatment before taking him to Truckee and in failing to give him proper medical attention at Truckee, and that said negligence aggravated appellant's injuries. These allegations were denied by appellee.

On November 21, 1942, appellant moved the court to strike his demand for a jury trial. The motion was denied. Trial of the action was commenced on November 24, 1942. After a jury was empaneled and sworn, appellant challenged the twelve jurors comprising it.[4] The challenge was overruled and the trial proceeded. At the close of all the evidence, appellant moved the court for a directed verdict in his favor. The motion was denied. The jury returned a verdict for appellee. Appellant moved for a new trial and, in connection therewith, moved for leave to take depositions. Both motions were denied, and judgment was entered for appellee. From that judgment this appeal is prosecuted.

Appellant specifies as error the overruling of his challenge to the array—the panel of prospective jurors drawn as aforesaid. The challenge was based on eight stated grounds. Ground 1 was that the judges of the District Court "failed to prescribe any rules of qualifications or otherwise for the selection of said jury panel." The judges were not required to prescribe such rules.

Ground 2 was that "mostly business executives or those having the employer's viewpoint [were] purposely selected [fol. 991] on said panel." Actually, no one was "selected on said panel," purposely or otherwise. The panel was

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[3] Appellant called this challenge a motion to strike out the panel.

[4] Appellant called this challenge a motion to strike out the twelve jurors.

not selected, but was drawn, as required by § 276 of the Judicial Code, 28 U. S. C. A. § 412, from a box containing the names of not less than 300 persons possessing the qualifications prescribed in § 275 of the Judicial Code, 28 U. S. C. A. § 411, which names had been placed in the box by the clerk of the District Court, or a duly qualified deputy clerk, and a duly appointed jury commissioner. There was no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were "mostly business executives or those having the employer's viewpoint."

Ground 3 was that "a larger proportion of men jurors [were] purposely selected, thus discriminating against women jurors." Actually, neither men nor women were selected as members of the panel; for, as said before, the panel was not selected, but was drawn from a box containing the names of not less than 300 persons. There was no evidence that women were discriminated against in placing names in the box or in drawing names therefrom. Many of the persons whose names were in the box, and many of the persons whose names were drawn therefrom and who thus became members of the panel, were women. The fact, if it be a fact, that a majority were men is immaterial.

Ground 4 was that "no examination whatever [was] made of said jurors before they [were] put on said panel to ascertain their qualifications or particularly their unfitness by reason of business or other connections with or prejudice in favor of such gigantic corporations as [appellee]." No such examination was required.

Ground 5[5] was that the judges of the District Court "failed to provide the necessary facilities or funds to permit proper investigation of prospective jurors." The judges were not required to provide such facilities or funds.

Ground 6 was that "no effort [was] made to proportionately or fairly represent citizens of all races on said

[5] In appellant's challenge to the array, grounds 4 and 5 were numbered 4, and grounds 6, 7 and 8 were numbered 5, 6 and 7.

panel, thus systematically excluding Negroes and Chinese." [fol. 992] Proportional representation of "citizens of all race on said panel" was not required. The box from which the panel was drawn contained the names of citizens of the Negro race and of the Chinese race. Citizens of these races were not excluded, systematically or otherwise.

Ground 7 was that "no effort [was] made to apportion jurors by districts when selecting them." No such apportionment was required.

Ground 8 was that appellee had "been able to prevail in every personal injury action against it, tried by a jury in [the District] Court," in the nine years next preceding the date of the challenge to the array. This, if true, is immaterial.

The challenge to the array was properly overruled.

Appellant specifies as error the denial of his motion to strike his demand for a jury trial. The motion was, in effect, an attempt to withdraw the demand, which appellant could not do without appellee's consent.[6] Appellee did not consent to, but opposed, the attempted withdrawal. The motion was properly denied.

Appellant specifies as error the overruling of his challenge to the twelve trial jurors—a challenge interposed after the jury was empaneled and sworn. This challenge was based on the eight stated grounds hereinabove discussed and shown to be untenable, and on the further ground that six of the jurors[7] were "closely affiliated and connected with" appellee. There was no evidence that any of the six jurors was so affiliated or connected. This challenge was properly overruled.

Appellant specifies as error the admission of appellee's Exhibit A-5 in evidence. Exhibit A-5 was a part of a certified copy of the complaint in an action brought by appellant's wife, Billie Belle Brown Thiel, against appellant on October 9, 1940, in the Superior Court of the State of California in and for the City and County of San Fran- [fol. 993] cisco—the part showing paragraph VII of the

[6] See Rule 38(d) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

[7] James A. Levensaler, Phyllis B. Goeppner, Frederick W. Knight, Frederick M. Holweisner, Herbert N. Bright and Maurice A. Cale.

complaint.[8] Paragraph VII alleged that appellant "attempted to commit suicide and jumped from the window of a moving train,[9] resulting in injury to [appellant]." Though duly served with process, appellant failed to answer, and his wife took judgment against him by default. In view of his default—his failure to answer, much less deny, the allegations of his wife's complaint—we think that paragraph VII thereof (Exhibit A-5) was admissible in evidence.[10]

Appellant specifies as error the alleged denial of his alleged "right to explain the full circumstances of said default, including his attempt to have his wife's attorney remove the false allegation about his attempted suicide." No such explanation was offered.

Appellant specifies as error the denial of his motion for a directed verdict. The denial was proper for the following reasons:

There was evidence tending to show that appellant was "out of his normal mind" on February 25, 1940, as alleged in his complaint, and there was evidence tending to show the contrary. There was evidence tending to show that, before accepting appellant as a passenger, appellee was informed that he was "out of his normal mind" and therefore should not be accepted as a passenger or else should be guarded, and there was evidence tending to show the contrary. These conflicts were for the jury, not the court, to resolve.

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[8] The certified copy mentioned above—a copy of the entire complaint—was exhibited to the court and to appellant's counsel, but only paragraph VII thereof was offered in evidence. However, in offering paragraph VII, appellee indicated its willingness to have the entire document put in evidence if appellant's counsel so desired. Appellant's counsel thereupon indicated that he had no such desire. Accordingly, other portions of the document were not put in evidence and are not before us.

[9] Meaning appellee's train No. 9, from which appellant leaped on February 25, 1940.

[10] Estate of McCarthy, 127 Cal. App. 80, 15 P. 2d 223; Bonazzi v. Fortney, 94 Vt. 263, 110 Atl. 439; 1 Greenleaf on Evidence, 16th Ed., § 527(a); 4 Wigmore on Evidence, 3d Ed., §§ 1066, 1072 (pp. 60, 79).

The evidence showed that appellee accepted appellant as a passenger and left him unguarded. Whether or not [fol. 994] this conduct of appellee constituted negligence was a question for the jury. We cannot say that it constituted negligence as a matter of law.

The evidence showed that, as appellant leaped through the train window, a fellow passenger (John A. Morris) and one or two others tried to stop him. They were able to, and did, take hold of his coat and held him, dangling outside the window, for an estimated period of a minute and a half, but despite their efforts, he slipped from his coat and fell to the ground. A brakeman (William A. Sherman), seeing appellant leap through the window, signaled the engineer to stop the train. The engineer did so. Appellant, however, fell to the ground before the train was stopped. As to whether the train could have been stopped before appellant fell, the evidence was conflicting. This conflict was for the jury, not the court, to resolve.

The evidence showed that appellee did not give appellant any first aid treatment before taking him to Truckee. Whether or not the failure to do so constituted negligence was a question for the jury. We cannot say that it constituted negligence as a matter of law.

The evidence did not show that appellee failed to give appellant proper medical attention at Truckee. Instead, the evidence showed there was no such failure.

Appellant specifies as error the giving of certain instructions to the jury. In the trial court, appellant did not state the grounds, if any, of his objection to the instructions. Therefore the giving of the instructions was not assignable as error.[11]

Appellant specifies as error the denial of his motion for a new trial and the denial of his motion to take depositions in support of his motion for a new trial. These motions were addressed to the trial court's discretion, the exercise of which, in the absence of abuse, is not reviewable. No abuse is shown.

Judgment affirmed.

[File endorsement omitted.]

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[11] See Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following § 723c.

[fol. 995] In United States Circuit Court of Appeals for the Ninth Circuit

No. 10681

Gilbert E. Thiel, Appellant,

vs.

Southern Pacific Company, a Corporation, Appellee

Judgment—Filed May 15, 1945

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 996] In United States Circuit Court of Appeals for the Ninth Circuit

Before Mathews, Stephens and Healy, Circuit Judges

Order Denying Petition for Rehearing—June 8, 1945

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed June 7, 1945, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[fol. 997] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10681

GILBERT E. THIEL, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Appellee.

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing nine hundred and ninety-six (996) pages, numbered from and including 1 to and including 996, to be a full, true and correct copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States as the original thereof remains on file and appears of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this sixth day of August, 1945.

Paul P. O'Brien, Clerk. (Seal.)

[fol. 998] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED *In Forma Pauperis*—Filed January 14, 1946

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration of this motion.

[fol. 999] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question whether petitioner's motion to strike the jury panel was properly denied.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[Endorsed on cover:] In forma pauperis. Enter Gilbert E. Thiel, pro se. File No. 50052. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 349. Gilbert E. Thiel, Petitioner, vs. Southern Pacific Company. Petition for writ of certiorari and exhibit thereto. Filed August 20, 1945. Term No. 349 O. T. 1945.